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THE CONTRACTING SHIPPER'S STRICT LIABILITY IN THE CARRIAGE OF DANGEROUS GOODS BY SEA

A critical study from a Nordic perspective

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Pursuant to 13:41 (§ 291) of the Nordic Maritime Codes (NMC) the contracting shipper is strictly liable for damage caused by dangerous goods, where he has handed over the goods to a carrier without informing him of their dangerous properties and where the carrier is not otherwise aware of their dangerous properties. In this thesis the strict liability rule is analysed from both a de lege lata and de lege ferenda point of view. The study reveals that the current liability model is not fully satisfactory as it confers an imbalance between the interests of the contracting shipper and the carrier. It is therefore necessary to review the special liability regime in respect of dangerous goods.

The thesis concludes that there are still arguments in favour of maintaining the strict basis of liability, however, the rule must take predictability considerations into account when defining "dangerous goods" and ensure that a sufficient level of care is required by the carrier also when dangerous goods are being carried. The definition of dangerous goods must not necessarily be tied to public safety regulation, such as the IMDG Code. However, there is a need to ensure that the dangerousness assessment performed by the courts in hindsight, where a damage has already occurred, will be based on what was known of the goods at the time of shipment. The perspective shall be that of a prudent contracting shipper. In the author's view, a more predictable dangerous goods definition is crucial for obtaining a proper balance of interests between the parties to the contract of carriage. Furthermore, the strict liability rule shall also take the constructive knowledge of the carrier into account, meaning that the contracting shipper shall never be strictly liable where it is proven that the contracting carrier was, or ought to be, aware of the dangerous nature of the goods. The carriers must thus actively and to a proper extent acquaint himself with the properties of the goods he is to carry. The thesis also concludes that the contracting shipper's failure to inform as a separate precondition for strict liability is superfluous and should therefore be abolished.

The thesis proposes a new liability model embracing the above aspects. The proposed liability model is aimed at ensuring a proper flow of information along the chain of carriers, as information is the key to prevent damage caused by dangerous goods.

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1. Introduction

1.1. Background

Dangerous goods carried by sea may pose a great threat to the carrying ship, cargo onboard, people and the environment, especially if the goods are not handled correctly. The consequences of dangerous cargo being shipped without the carrier being aware of its special nature may prove fatal. The dangerous cargo may be handled or stowed incorrectly by the crew which may, in the worst case, result in the sinking of the carrying vessel.

The views on how the liability shall be apportioned between the parties involved in the maritime venture has varied over time and between jurisdictions. The general approach today however seems to be that the contracting shipper is in the best position to know the characteristics of the cargo and the necessary precautions that need to be taken to ensure a safe carriage. An extensive liability has therefore been imposed on the contracting shipper of dangerous goods in Finland and other jurisdictions.

1.2. Identification of a legal problem

In Finnish law, the allocation of obligations and liability between the contracting shipper[1] of the cargo and the carrier[2] in maritime carriage of dangerous goods is regulated in Chapter 13 of the Maritime Code (FMC). The carrier's cargo liability is set out in Sections 24 to 39 of the chapter. Section 7 sets out the contracting shipper's specific obligations when shipping dangerous goods; he is obliged to notify the contracting and receiving carriers in due time of the dangerous nature of the goods and of necessary safety precautions. Furthermore, the goods shall be suitably marked as dangerous. Pursuant to 13:41 the contracting shipper is liable regardless of fault for damage caused by dangerous goods, where he has delivered the goods to a carrier without informing him according to Section 7 of the dangerous properties and necessary safety measures and where the carrier is not otherwise aware of their dangerous properties.

The provision contained in Section 41 raises questions on the applicability of the contracting shipper's strict liability rule under Finnish law. The construction of the strict liability rule implies that the contracting shipper is liable irrespective of whether he was familiar with the

[1] The term "contracting shipper" here refers to the "sender" pursuant to Chapter 13 of the FMC. As per the definition in FMC 13:1 the contracting shipper (sender) is the person who enters into a contract of carriage of general cargo with the carrier.

[2] As per the definition in FMC 13:1 the carrier is the person who enters into a contract of carriage of general cargo with the contracting shipper (sender).

dangerous characteristics of the cargo or not. He thus bears the risk of having misjudged the nature of the goods, and of not having any information whatsoever on the potential dangerousness of the goods. In such a situation, the contracting shipper can only escape strict liability where the carrier is otherwise aware of the dangerous characteristics of the goods. Where the strict liability rule is not inactivated, the fault-based liability in respect of ordinary goods, as contained in FMC 13:40, may be applied.[3] In order to understand the applicability of the strict liability rule, the following issues thus needs to be considered:

a) What cargo is considered "dangerous"?
b) What kind of information is the contracting shipper required to provide to the carrier to make him aware of the dangerous nature and the required safety precautions?
c) When is the carrier considered being "otherwise" aware of the dangerous nature?

The knowledge of the parties appears to play a prominent role in determining the applicability of the strict liability rule, at least where one is to answer the second and third questions above. The contracting shipper cannot inform of anything he is not aware of, and to escape strict liability, he will then have to prove that the carrier was otherwise aware of the dangerous nature of the goods. Interestingly, the leading English legal scholar Michael Mustill has argued that the carrier's knowledge of the nature of the cargo will also have implications on the assessment of whether the cargo is dangerous or not.[4] In Mustill's reasoning, any cargo may entail danger if not handled correctly due to the carrier's ignorance of its special requirements. As this study will show, the notion of "dangerous goods" is more narrowly defined in Nordic law and is primarily focused on the inherent dangerous properties of the goods. Mustill's reasoning however shows the importance of ensuring a proper exchange of information between the contracting shipper and the carrier to minimize the risks during carriage, which must be considered the core purpose of the strict liability rule.

The contracting shipper's strict liability has been justified by asserting that that the contracting shipper has the best possibilities of controlling the characteristics of the cargo and thus to prevent damage caused by dangerous goods.[5] This is true where the contracting shipper has an actual chance of detecting the potential dangerous properties of the goods when

[3] Hannu Honka, 'New Carriage of Goods by Sea - The Nordic Approach' in Hannu Honka (ed), *New carriage of goods by sea: The Nordic approach including comparisions with some other jurisdictions* (Institute of Martime and Commercial Law 1997), 157.
[4] Michael J Mustill, 'Carrier's Liabilities and Insurance' in Kurt Grönfors (ed), *Damage from Goods* (Skrifter/ Sjörättsföreningen i Göteborg vol 58. Akademiförlaget 1978), 76.
[5] Cf. inter alia ND 1941.353 Else (DCC), 362.

making proper investigations of the nature and requirements of the goods. However, there are certain types of goods that exhibit dangerous characteristics under very special conditions, such as under the strains of a sea carriage in hard weather. These characteristics may not be generally known. Furthermore, new substances may possess properties that no one is yet aware of.

The strict liability rule is therefore brought to a head in situations where neither the contracting shipper nor the carrier knew, or ought to have known, the goods were dangerous. A crucial issue is how the risk for damage caused by the dangerous goods shall be distributed in such a case. Under the current liability model, the risk is placed on the contracting shipper. It goes without saying that it is impossible for the contracting shipper to fulfill his obligation to inform, and prevent damage from occurring, when he was not ought to be aware of the dangerous characteristics. His only way out of strict liability is then if the carrier was otherwise aware of the nature of the goods. As this study will show, under current Nordic law, the contracting shipper will be strictly liable even where he had no means of knowing the dangerous properties of the cargo, but the carrier was in a better position of observing the dangerous properties of the goods. It thus does not appear to strike a fair balance between the interests of the contracting shipper and the carrier.

1.3.Purpose and scope of the study

The purpose of this thesis it to investigate the applicability of the contracting shipper's strict liability for damage caused by dangerous goods from a *de lege lata* and *de lege ferenda* point of view. The strict liability of the contracting shipper under FMC is the starting point for this study. However, as the Nordic Maritime Codes (NMC) are to a considerable extent similar, there is no reason not to expand the scope of the study to cover the law of the Nordic countries in general. In this context, the "Nordic countries" refers to Finland, Sweden, Denmark and Norway. The reason for this definition is that these countries had an extensive cooperation when drafting their new maritime codes in the 1980's and 1990's.[6]

The core research question may thus be expressed in the following way: *Is the current construction of the contracting shipper's strict liability under the NMC appropriate?* As have been concluded when identifying the legal issues connected to the contracting shipper's strict liability, there are three main parameters that affect the applicability of the strict liability rule. These must be analyzed separately to be able to draw any conclusions as to when the

[6] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 3), 16 f.

strict liability comes into play, and furthermore to consider whether the current liability model is appropriate.

The *first parameter* is the determination of what goods shall be considered "dangerous" for the purpose of the strict liability. The NMC contain no definition of "dangerous goods". The Finnish Government Bill on a Maritime Code (Finnish Bill) provides some guidelines[7], however, much discretion is left to the courts to decide on the dangerousness of a particular cargo.

The *second parameter* is the information the contracting shipper is obliged to give to the carrier in order to fulfill his obligation to inform under FMC 13:7 and thus be relieved of his strict liability under 13:41.

Under the *third parameter* the question rather is where the threshold is set as to when the carrier shall be considered being "otherwise" aware of the dangerous characteristics of the cargo. Is the strict liability inactivated already where the carrier is *ought to be aware* of the danger? And what relevance do the carrier's general duty of care in respect of carried goods have in this context? The second and third parameters are very much interrelated, as both require that the carrier shall in one way or another have become aware of the dangerous nature of the goods.

It appears to be a range of considerations to make to determine whether the contracting shipper's liability for dangerous goods should be strict or fault-based. The first step of this thesis is to undertake an extensive analysis of the current state of Nordic law with regards to these issues. The analysis will reveal shortcomings in the current liability construction. After having drawn conclusions as to the applicability of the strict liability rule, a more critical approach to the topic will be appropriate to answer the question whether the basis and scope of the contracting shipper's liability for damage caused by dangerous goods are still justified. This critical scrutiny will take as its starting point the established shortcomings of the construction, general theories on strict liability and alternative ways of constructing, or construing, the dangerous goods liability. The main focus will be on finding an appropriate balance between the interests of the contracting shipper and the carrier. In sub-chapter 6.7.4. some considerations will also be made to other interests, given the extensive damage that the carriage of dangerous goods may cause to persons, property and environment. It must however

[7] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland), 35.

be kept in mind that the strict liability rule as contained in NMC 13:41 is aimed at regulating the internal distribution of risks between the contracting shipper and the carrier(s). The construction of the strict liability rule will only have a limited impact on the channeling of liability for damage caused by dangerous goods in general. However, an effective liability construction under NMC 13:41 will promote the prevention of losses caused by dangerous goods, which will be of public interest.

1.4.Delimitations

There is a large quantity of international legal literature on the theme of carriage of dangerous goods, covering a variety of perspectives and viewpoints. As the title of the thesis already suggests, some extensive delimitations have been made to the scope of the study. The objective of the thesis is restricted to investigating the contracting shipper's strict liability for damage caused by dangerous goods during sea carriage. This excludes carriage by other modes of transport. The strict liability is set out in Chapter 13 of the NMC, which as a starting point applies to *carriage of general cargo* only. The chapter may under certain circumstances apply also to the relationship between the parties to a charterparty. However, the rules on dangerous goods as contained in Chapter 13 will never come into play in charterparty relations. This is due to the fact that Chapter 13 explicitly excludes charterparties from its scope of application. Only where a bill of lading has been issued pursuant to a charterparty will the provisions of Chapter 13 apply mandatorily to the relationship between the carrier and a third-party holder of the bill.[8] As the contracting shipper is defined as the carrier's contractual party[9], the contracting shipper can never be a third-party holder of the bill.

Another reason for excluding charterparty relations from the scope of this thesis is that strict liability in respect of damage caused by dangerous goods is an unknown concept in charterparty relations. Charterparties are governed by Chapter 14 in the NMC. The only provision in Chapter 14 specifically touching on the transport of dangerous goods is 14:22, setting out the voyage charterparty carrier's rights of disposing of dangerous goods. The liability of the (voyage) charterer when shipping dangerous goods must be decided on the basis of NMC 14:37 which sets out a general fault-based liability for "damage caused by the goods".

Furthermore, this study is confined to the contracting shipper's liability *to the carrier*. The contracting shipper is by the definition in NMC 13:1 the contractual party to the carrier,

[8] NMC 13:3 first paragraph second sentence.
[9] NMC 13:1.

meaning that the liability may be considered a contractual one. However, as will be shown, the contracting shipper is not only liable to the contractual carrier under NMC 13:41 but also to a sub-carrier, i.e. a carrier who is contracted by the contracting carrier to perform the carriage or part of it[10]. It is not fully clear to what extent the liability towards a sub-carrier is considered falling within the contract, but under Nordic law a contract will generally be considered established with the contracting shipper where an actual carrier physically takes the goods in his charge.[11] This must mean that the contracting shipper's liability both to the contracting carrier and to the sub-carriers performing part of the carriage will be contractual. As NMC 13:41 regulates the contracting shipper's liability to the carrier(s), his liability towards third parties will not be considered in this study. However, the contracting may become indirectly liable for damage caused to third parties by way of the carrier's recourse actions pursuant to NMC 13:41. These may relate to damage caused to the goods of other cargo owners, other property onboard or outside the ship or human injuries or death. The registered shipowner is subject to a strict liability to third-parties under several international conventions, such as the Civil Liability Convention (CLC)[12], Bunker Convention[13] (BC) and Hazardous and Noxious Substances Convention (HNSC)[14].

NMC 13:41 gives the carrier the right to dispose of dangerous goods where the contracting shipper has not informed of their dangerous nature in due time. The carrier is then entitled to unload, render innocuous or destroy the goods without any liability to compensate the contracting shipper for the damage caused. As this provision is not directly relevant to the discussion on the applicability of the contracting shipper's strict liability, it will not be taken into further account in this thesis.

1.5.Method and materials

In order to determine the current state of Nordic law, it is necessary to interpret and systematize the applicable law. However, the study of the contracting shipper's strict liability is

[10] Cf. definition of sub-carrier in NMC 13:1.
[11] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 3), 152. For further discussions on the relationship between the contracting shipper and an actual carrier, cf. Hannu Honka, 'New Carriage of Goods by Sea - The Nordic Approach' in Hannu Honka (ed), *New carriage of goods by sea: The Nordic approach including comparisions with some other jurisdictions* (Institute of Martime and Commercial Law 1997), 76.
[12] International Convention on Civil Liability for Oil Pollution Damage 1992
[13] International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
[14] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996

also aimed at questioning the appropriateness of the current liability construction. The method may thus be described as a critical legal dogmatic method.

The starting point of the study is the (two) provisions on dangerous goods contained in the NMC Chapter 13. It will however also be necessary to take other parts of the NMC into account and to undertake some systematization of applicable law provisions to determine the applicability of the strict liability rule. The carrier's general carriage obligations will require consideration to strike a balance between the respective obligations and liabilities of the parties to the contract of carriage. To at all be able to structure the law on the topic in a logical way, the first step will be to construe the meaning of the NMC provisions.

In the interpretation of the relevant provisions in the NMC, the starting point will be the wording of the provisions, and the natural understanding of them. The preparatory works to the NMC will also be considered in order to trace the intention of the legislator. The previous Nordic maritime codes and their preparatory works will be studied to track the legislative development and obtain an understanding of the liability construction. The fact that the legislator did not intend any material changes to the dangerous goods provisions in the 1994 revision of the maritime codes[15] further supports the study of the previous codes, their preparatory materials and case law stemming from that time.

The dangerous good provisions as contained in the NMC are founded on international conventions on the carriage of goods by sea, primarily the Hague Rules (HR)[16] and Hague-Visby Rules[17] (HVR). However, when the NMC were amended in 1994, some specifications were made in accordance with the Hamburg Rules[18], even though the Nordic countries have not ratified the convention.[19] It was decided to adopt the parts of the Hamburg Rules which were not in direct conflict with the HVR.[20] Consequently, it will be necessary to have a look at the dangerous goods provisions included in these conventions. However, this will be done only to the extent the wording of the NMC is ambiguous.

[15] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50.
[16] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924
[17] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as Amended by the Protocol signed at Brussels on 23 February 1968 and the Protocol signed at Brussels on 21 December 1979
[18] United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg on 31 March 1978
[19] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50.
[20] ibid, 17.

Relevant legal doctrine and case law will also be considered in the interpretation of the provisions. The Nordic legal research on the topic is however sparse. The Nordic materials do not generally go into great depth on the contracting shipper's obligations and liabilities in connection with the shipment of dangerous goods. The amount of relevant court decisions is also limited. Consequently, foreign doctrine and case law will be considered to the extent it may provide some guidance on the interpretation of the Nordic law. Such guidance may possibly be found in the court practice of other member states of the HR/HVR and/or the Hamburg Rules[21]. In the UK, there is extensive legal research and case law on the topic. The UK is party to the HVR, which have been implemented through the Carriage of Goods by Sea Act 1971 (UK COGSA).[22] Given that the conventions aim at creating uniform rules on the carriage of goods by sea, some parallels will be drawn from the UK case law and doctrine. This will however be undertaken with great care and awareness of the differences between the legal systems. When it comes to the use of UK case law, it will be crucial to make a distinction between case law where statutory provisions, such as the UK COGSA, are applied on the one hand and common law on the other hand. Common law applies where nothing has been specifically agreed between the parties to a contract and where no statues are applicable.[23] Common law is created and developed through case law only. In the *de lege lata* discussion in this thesis, the consideration of UK case law will be restricted to cases where statutes are applicable. However, the common law approach to the contracting shipper's liability for dangerous goods might provide interesting perspectives for the *de lege ferenda* discussion.

In the *de lege ferenda* analysis of the applicability of the contracting shipper's strict liability under Nordic law, comparations will also made to the UK approach and to the solution under the Rotterdam Rules (RR)[24]. The legal dogmatic method will thus contain comparative elements. It would be to go too far to assert that a comparative method is to be used in addition to the legal dogmatic method, as the purpose of the comparation is merely to support the *de lege ferenda* discussion. A full-scale legal comparation would require in-depth

[21] Given the fact that the Hamburg Rules have primarily been ratified by developing countries, with legal systems that are not very similar to the Nordic systems, case law relating to Hamburg Rules is rare and not of great interest to this study.
[22] Jonathan Campbell and Kirsty MacHardy, 'Carriage of goods by sea in the UK' (2018) <www.lexology.com> accessed 24 April 2019
[23] Stephen D Girvin, 'Shipper's Liability for the Carriage of Dangerous Cargoes by Sea' [1996] Lloyds Maritime and Commercial Law Quarterly 487, 487-488.
[24] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008.

considerations of the legal environment in which the rules of law exist.[25] Such considerations are not possible to make within the scope of this thesis, but the distinct features of and differences between the common law and continental legal systems will be kept in mind throughout the *de lege ferenda* discussion.

Furthermore, also general theories on the functions of a strict liability will be considered when discussion the contracting shipper's liability from a critical point of view. The discussion will primarily focus on the economic preventive function of the strict liability, i.e. whether the application of a strict liability is the most efficient way to reduce the total costs for damage caused by dangerous goods. The thesis will thus to some extent include arguments from a law and economics point of view.

1.6.Disposition

The introductory chapter has outlined the purpose and scope of the thesis and has made some important delimitations. Furthermore, it has reflected on the choice of research method and on the most relevant materials used.

The substantive part of the thesis consists of two parts. Part I considers *de lege lata* the current state of Nordic law when it comes to the contracting shipper's liability for damage caused by dangerous goods. In Part II a more critical *de lege ferenda* approach is taken in order to draw conclusions on whether the basis and scope of the contracting shipper's liability is justified.

Part I is divided into five chapters. Chapter 2 provides an overview of the dangerous goods provisions primarily in the NMC, but also in the HVR and Hamburg Rules, as the relevant parts of the NMC are derived from those conventions.

In chapter 3 the meaning of "dangerous" in this context is analyzed, in order to determine when the contracting shipper's strict liability under is triggered under Nordic law.

Chapter 4 aims at investigating the contracting shipper's obligation to inform of the dangerous nature of the goods and the carrier's knowledge of the dangerousness of goods. These issues are interrelated and can hardly be separated. In 4.1. considerations will also be made to some of the contracting shipper's other obligations, which are of relevance to the fulfillment of the obligation to inform and consequently the application of the strict liability. These are e.g. the duty to mark the goods as dangerous and to provide the carrier with information

[25] Cf. Stig Strömholm, 'Har den komparative rätten en metod?' [1972] SvJT 456, 460-462.

on necessary precautionary measures. In sub-chapter 4.2. the aim is to draw conclusions on the degree of knowledge required by the carrier for the contracting shipper to be relieved of his strict liability. Furthermore, it will be specifically considered whether there are any grounds for asserting that the carrier shall be obliged to actively seek information on the nature of cargo.

To summarize the *de lege lata* analysis of the Nordic state of law, the conclusions made in sub-chapters 4.2. and 4.3. will be balanced in Chapter 5 to determine the true allocation of risks between the parties. This will also serve as a bridge to Part II of the thesis, Chapters 6 and 7, which aims at answering the question whether the current liability construction is appropriate. And if it is not considered appropriate, what would a better solution look like?

Part I The dangerous goods liability of the contracting shipper – de lege lata

2. The dangerous goods provisions in the NMC, HVR and Hamburg Rules

2.1.The Nordic Maritime Codes

2.1.1. An introduction to the NMC

Nordic legislative cooperation in the field of maritime law is not a new phenomenon. The first manifest example of this was the Maritime Code introduced in Sweden-Finland in 1667.[26] During the 20th century, the HR and HVR were implemented into maritime codes in all Nordic countries. In the early 1980's the work with preparing new legislation on the carriage of goods by sea was initiated by the governments in Finland, Sweden, Norway and Denmark. The maritime law committees in each country were instructed co-operate in the drafting of the new maritime codes.[27] In this context, "Nordic" thus refers to the countries of Finland, Sweden, Denmark and Norway. The current NMC entered into force in 1994.

One underlying reason for the timing of the revision of the maritime codes was the entry into force of the Hamburg Rules in 1992. A crucial issue was whether the Nordic countries would give them effect or not.[28] As have already been stated, the compromise found was that the Nordic countries implemented the parts of the Hamburg Rules which do not directly contradict with the provisions of the HVR. In respect of the carriage of dangerous goods, the NMC

[26] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 3), 16.
[27] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 14-15.
[28] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 15.

follow the Hamburg concept, which contains some specifications compared to the HVR. This was not considered to entail any contradictions.[29]

The provisions in the maritime codes of Finland, Sweden, Norway and Denmark are identically worded, however the technical systems for numbering the provisions differ. Finland and Sweden use the same technical system, with each chapter divided into sections. In Norway and Denmark the sections are numbered continuously, so that only the relevant section(s) must be included when referring to the codes. In the discussion on the dangerous goods provisions in the NMC, reference will primarily be made to the sections in the FMC, and consequently also of the Swedish Maritime Code[30] (SMC). However, the corresponding rule in the Norwegian Maritime Code[31] (NoMC) and Danish Maritime Code[32] (DMC) will be referred to in brackets.

2.1.2. The contracting shipper's legal position

Pursuant to the ordinary liability rule as provided in NMC 13:40 (§ 290), the contracting shipper (in Swedish *avsändare*) is liable where damage is caused by the fault or negligence of the contracting shipper or someone who the contracting shipper is responsible for. However, where dangerous goods have been shipped without the carrier's knowledge of the dangerous characteristics of the goods, the contracting shipper's liability towards the carrier and sub-carrier(s) is strict. As per the definition contained in NMC 13:1 (§ 251) the contracting shipper is the person entering into a contract of carriage with the carrier. The carrier is correspondingly defined as the person entering into a contract of carriage with the contracting shipper. One thus need to examine the contract of carriage to identify the carrier and the contracting shipper respectively. Where the goods are shipped in connection with a sale, the delivery terms of the sales contract will determine whether it is the seller or buyer who is responsible for arranging and contracting for the carriage of the goods. The contracting shipper shall be distinguished from the *shipper (*in Swedish *avlastare),* which may be a separate person, who is not a party to the contract of carriage. The shipper is defined as the person who delivers the goods for carriage[33]. The shipper may be held liable by the carrier under the NMC 13:51 (§ 301) for incorrect information that has been entered on the bill of lading

[29] Thomas Rhidian, 'Special liability regimes under the international conventions for the carriage of goods by sea – dangerous cargo and deck cargo' [2010] Nederlands Tijdschrift voor Handelsrecht 197, 198-199.
[30] Maritime Code 1994:1009 (Sweden)
[31] Maritime Code (Act no. 39 of 1994)
[32] Merchant Shipping Act (Act no. 170 of 1995)
[33] FMC 13:1 (§ 251)

on his request, but he has no obligation to notify the carrier of any potential dangerous characteristics of the goods, and consequently no liability in this regard. The shipper's role is therefore irrelevant for the further discussion.

Distinction must also be made between the use of the term *shipper* under the NMC on one hand and under the laws of other jurisdictions and in international conventions on the other hand. Firstly, there are discrepancies between the English translations of the NMC. In the Finnish translation[34] the term "avsändare", i.e. the carrier's contractual party, has been translated into "*contracting shipper*", whereas the party delivering the goods for carriage is the "*actual shipper*". In Denmark, the parties are named *"shipper"* and *"consignor"* respectively. Norway and Sweden have adopted a uniform approach in naming the carrier's contracting party "*sender"* and the party delivering the goods "*shipper*".

Secondly, under the international conventions and in other jurisdictions, the dangerous goods liability is generally placed on the shoulders of the *shipper*. The HR and HVR contain no specific definition of "shipper", but from the definition of "carrier" it is evident that the shipper shall must be considered the carrier's contracting party. Under the Hamburg Rules, the shipper is defined as the carrier's contracting party under the contract of carriage or the person who actually delivered the goods to the carrier. The Hamburg definition thus comprises both the "contracting shipper" and "shipper" pursuant to the FMC terminology. When these are not the same person, it must be assumed that they are jointly liable for failure to meet the obligations of the shipper under the Hamburg Rules. In the second Danish Committee Report on Carriage of Goods by Sea, the need to make a distinction between those persons in the NMC was enhanced.[35] Under the United States Carriage of Goods by Sea Act 1936 (US COGSA) and UK COGSA, being based on the HVR and HR, *the shipper* must be understood along the same lines as in the conventions.

As this thesis will be discussing the dangerous goods liability from the perspectives of Nordic, English and international law, it is necessary to establish a common use of terminology. As the starting point of the study is Nordic law in general and Finnish law in particular, I have chosen to adopt the Finnish approach to use the term "contracting shipper" for the party

[34] Cf. the English translation of the FMC as contained in Hannu Honka (ed.), New carriage of goods by sea: The Nordic approach including comparisons with some other jurisdictions (Institute of Maritime and Commercial Law 1997), Appendix 1. According to Honka the same translation is found in Publication L 37/95 of the Ministry of Transport and Communications in Finland. At the time of writing this thesis, the translation is however not available anymore.

[35] Committee Report 2 on Carriage of Goods by Sea, Denmark, 'Betænkning nr. 1215 (2. Betænkning afgivet av sølovsudvalget angående Befordring af gods)'

entering into a contract of carriage with the carrier and being strictly liable for damage caused by dangerous goods. By the term "actual shipper" I will be referring to the person who delivers the good for carriage. In my opinion, "contracting shipper" also describes the legal position of that party in a more appropriate way and is in addition more in line with the international terminology.

A carriage may engage several carriers. There is always at least one carrier, who enters into a contract with the contracting shipper, and he may or may not participate in the physical carriage of the cargo. There may also be one or several sub-carriers, to which the contracting carrier has let the execution of all or parts of the carriage. There is no express contract between the (original) contracting shipper and the sub-carrier(s), however, pursuant to FMC 13:36 (§ 286), the sub-carrier is liable to the contracting shipper for his part of the carriage pursuant to the same rules as the carrier. By the same token, under FMC 13:40 (§ 290) and 13:41 (§ 291), the contracting shipper is also directly liable to a sub-carrier for damage caused by the cargo. How the relationship between the contracting shipper and a sub-carrier shall be interpreted has been given consideration in Nordic doctrine. Nordic scholars and courts seem to acknowledge that there exists a legal principle within transport law according to which the carrier has a duty to care for goods in his disposition and that this duty will create a contractual relationship between a contracting shipper and a carrier who takes the goods in his charge.[36] The contracting shipper's liability to a sub-carrier who takes the goods in his charge must consequently also be considered contractual.

Within maritime law the carrier has an extensive right to limit his liability.[37] Firstly, the carrier enjoys a right to limit his liability for cargo damage pursuant to subject to NMC 13:30 (§ 280). This right of limitation is restricted to the carrier only. Furthermore, there is global limitation which, in respect of liability for other damage than passenger injuries, is calculated on the basis of the gross tonnage of the carrying vessel. The right to global limitation has pursuant to FMC 9:1 and SMC 9:1 been extended to inter alia the contracting shipper of the goods. The contracting shipper was added to the group of persons entitled to global limitation in the material revision of the maritime codes of Finland and Sweden in 1994. However, according to previous preparatory works to the codes the contracting shipper could limit his

[36] Lena Sisula-Tulokas, 'Allmänna principer och transporträtt - direktkravsproblematiken i HD 2013:33' (2014) 3 JFT 162, 169; Kurt Grönfors, 'Fraktavtalet och den allmänna avtalsrätten' [1988] SvJT 181, 61. See also HD 2013:33 from the Finnish Supreme Court.
[37] Cf. FMC Chapter 9.

liability also before 1994.[38] The right to limit liability under FMC and SMC Chapter 9 comprises inter alia damage to persons and property and measures to discharge, destroy or render innocuous goods. The limitation right is lost where damage has been caused willfully or with gross negligence. However, neither the NoMC nor the DMC grant the contracting shipper any right of global limitation of liability. This constitutes a material difference from the contracting shipper's point of view, which must be considered when assessing whether it is *de lege ferenda* right to place a strict liability on the contracting shipper for dangerous goods.

2.1.3. The scope of the mandatory application of Chapter 13

The provisions on the contracting shipper's liability for dangerous goods are contained in Chapter 13 of the NMC. The geographical scope of application of Chapter 13 is set out in NMC 13:2 (§ 252). The Nordic courts will apply Chapter 13 to domestic and inter-Nordic carriage. Chapter 13 will also be applicable where the carriage has no connection to the Nordic countries, but where the agreed port of discharge is a state bound by the HVR, or where the transport document has been issued in such a state. Chapter 13 will also apply where the transport document states that HVR or the law of an HVR member state shall be applicable. However, where neither the place of loading or delivery is in a Nordic country, the contractual parties are free to agree that their contract shall be governed by the laws of another HVR state. Otherwise the provisions of Chapter 13 will have mandatory application to the contracts of carriage which fall within its scope of application.[39] The mandatory nature of Chapter 13 means that a contractual provision will be void to the extent it conflicts with the rules contained in Chapter 13. There are however a few exceptions from the mandatory application of Chapter 13[40]. Furthermore, the carrier's obligations and liability may always be extended by agreement.[41] However, as far as the contracting shipper's liability for dangerous goods is concerned, Chapter 13 does not allow any derogations.

Chapter 13 governs contracts for the carriage of goods by sea. The NMC contain no definition of such contracts, and there are thus no formal requirements for a contract of carriage of goods by sea. However, pursuant to NMC 13:3 (§ 253) charterparties are explicitly excluded from the scope of application of Chapter 13.

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[38] Cf. Regeringens proposition till Riksdagen om ändring av sjölagen 10/1984 (Government Bill on amendment to the Finnish Maritime Code), 14 and Regeringens proposition om ändring av sjölagen 1982/83:159 (Government Bill on amendment of the Martime Code, Sweden), 98-99.
[39] Cf. NMC 13:4 (§ 254).
[40] Cf. NMC 13:4 (§ 254) second paragraph.
[41] Cf. NMC 13:4 (§254).

Considering the wide geographical application of the HR/HVR and their mandatory nature, the strict liability rule, as set out in NMC 13:41 (§ 291), will generally come into play. However, where the contract of carriage is in the form of a charterparty, Chapter 13 can never be mandatorily applicable between the a charterer and the carrier.[42] It should however be noted that it is not always easy to draw a distinct line between carriage of general cargo and charterparty carriage[43], and the parties may enter into a charterparty agreement instead of any other contract of carriage for the purpose of avoiding the mandatory rules of Chapter 13. The provisions on the carriage of general goods were developed, and distinguished from the rules on voyage chartering, primarily with liner trades in mind.[44] Also in modern trade, the mandatory rules of Chapter 13 play its most prominent role in the liner trade, where the contract is usually in the form of a booking note and/or liner bill of lading.[45]

2.1.4. The dangerous goods provisions in Chapter 13

The contracting shipper's strict liability for dangerous goods was introduced in the Nordic maritime codes in the revision in 1930's.[46] The main purpose of the revision was to implement the HR in the Nordic countries[47], which in Article IV paragraph 6 provides for a strict liability in respect of damage caused by dangerous goods. In the report from the Swedish Maritime Law Committee it was established that the placing of a strict liability on the shipper in accordance with the HR was "hardly questionable"[48], however, otherwise the Nordic preparatory materials did not comment on the introduction of a strict liability for dangerous goods. It is also difficult to trace the motives for the strict liability under the HR, however it is clear that the convention was modelled on the Canadian Water Carriage of Goods Act of

[42] Cf. Chapter 14:2 (§ 322) and 14:21 (§ 342).
[43] For a more detailed discussion on the problems associated with distinguishing carriage of general cargo from charterparty carriage, see Kurt Grönfors, *Sjölagens bestämmelser om godsbefordran* (P.A. Norstedt & Söners förlag 1982), 24 f.; Thor Falkanger, Hans J Bull and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective 4th ed.* (Universitetsforlaget 2017), 385-386; Jan Hellner, 'Sjölagen 1994. Några lagtsiftningstekniska synpunkter.' in Peter Wetterstein and Anders Beijer (eds), *Essays in honour of Hugo Tiberg: Professor of maritime law* (Norstedts juridik AB 1996), 337 f.; Committee Report on Carriage of Goods by Sea, Sweden (Statens offentliga utredningar SOU 1990:13), 'Översyn av sjölagen 2. Godsbefordran till sjöss. Slutbetänkande av sjölagsutredningen.' , 83; NOU 1993:36, 'Committee Report on Carriage of Goods by Sea, Norway (Norges offentlige utredninger): Godsbefordring til sjøs. Utredning XV fra utvalget til revisjon av sjøfartslovgivningen (Sjølovkomiteen).' , 57-58.
[44] Grönfors, *Sjölagens bestämmelser om godsbefordran* (n 43), 26.
[45] Falkanger, Bull and Brautaset (n 43), 320; Hannu Honka, 'Introduction' in Hannu Honka (ed), *New carriage of goods by sea: The Nordic approach including comparisions with some other jurisdictions* (Institute of Maritime and Commercial Law 1997), 3-4.
[46] Cf. Finnish Maritime Code 167/1939, Section 97. However, at that time, the liability was placed on the *shipper*.
[47] Statens offentliga utredningar (SOU 1936:17), 'Förslag till lag om ändringar i vissa delar av sjölagen m.m. avgivet av 1933 års sjölagstiftningskommitté' (1936), 281 f.
[48] ibid, 116.

1910 and US Harter Act of 1893.[49] Against this background, it may be assumed that the strict liability in HR was inspired by the absolute warranty for dangerous goods at common law. In the leading case *Brass* v. *Maitland*[50] from 1856 the majority held that there is an implied warranty from the shipper that the goods are non-dangerous and that this warranty is absolute, meaning that it is irrelevant whether the shipper was not ought to be aware of the dangerous properties of the goods.[51] The judge Lord Campbell, C.J., reasoned in the following way in placing an absolute obligation on the contracting shipper not to ship dangerous goods:

> "If the plaintiffs and those employed by them did not know and had no means of knowing the dangerous quality of the goods which caused the calamity, it seems most unjust and inexpedient to say that they have not remedy against those who might easily have prevented it… [I]t seems much more just and expedient that, although they were ignorant of the dangerous qualities of the goods, or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners."[52]

The rationale of the contracting shipper's strict liability was thus that he is in a better position to know the goods he is shipping. The court considered the situation when neither the carrier nor the contracting shipper was aware of the dangerous properties and found that it was appropriate to place the liability on the shipper also then. The same reasoning must be assumed to justify the strict liability under the international carriage regimes and the NMC.[53]

The contracting shipper's obligations and liability in respect of dangerous goods are regulated in NMC 13:7 (§ 257) and 13:41 (§ 291).

NMC 13:7 reads as follows[54]:

> Section 7. Dangerous goods
>
> Dangerous goods must be suitably marked as dangerous. The contracting shipper shall in due time inform the carrier and actual carrier to whom the goods are delivered of the dangerous nature of the goods and shall indicate the precautions that may be needed.
>
> Where the contracting shipper in any other case is aware that the goods are of such a nature that the carriage may involve risks or essential inconvenience to any person, vessel or goods, he shall likewise give notice to this effect.

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[49] ibid, 283.
[50] Brass v. Maitland & Ewing (1856) 6 El. & Bl. 470.
[51] William Tetley, Brian G McDonough and Elliott B Nixon, *Marine cargo claims* (International shipping laws, 3rd ed. International Shipping Publications, BLAIS 1988), 463.
[52] Brass v. Maitland & Ewing (1856) 6 El. & Bl. 470.
[53] In ND 1941.353 Else the court established that one of the underlying motives for the contracting shipper's strict liability is that the contracting shipper generally is in a better position to control the properties of the goods.
[54] The English translation is borrowed from Hannu Honka (ed.), New carriage of goods by sea: The Nordic approach including comparisons with some other jurisdictions (Institute of Maritime and Commercial Law 1997), Appendix 1. According to Honka the same translation is found in Publication L 37/95 of the Ministry of Transport and Communications in Finland. At the time of writing this thesis, the translation is however not available anymore.

Section 7 (§ 257), first paragraph, sets out the contracting shipper's obligations when shipping dangerous goods; he shall notify the contracting and the first actual carrier in due time of the dangerous characteristics of the goods and inform them of necessary precautionary measures. Furthermore, the goods shall be suitably marked as dangerous. The second paragraph of the section states that the contracting shipper shall also provide the same kind of information to the carrier where he knows that the goods may cause danger or substantial inconvenience to persons, ship or cargo. This stipulation has been included with consideration to inter alia contraband, goods under quarantine or other goods of a delicate nature that may lead to embargoes or similar international implications.[55] The definition of contraband etc. as dangerous goods is broader than the HR/HVR concept on dangerous goods, but follows an old Nordic approach which dates back to the pre-Hague days.[56] Furthermore, as will be concluded further on, a distinction must be made between the dangerous goods under the first and second paragraph when considering the scope of the contracting shipper's strict liability.

Section 7 (§ 257) does not contain any definition of "dangerous" goods. However, as the further study will show, the Nordic Government Bills on the NMC provides that national and international safety rules will provide guidance on what should at least be included in the definition.

It should however be noted that it is not sufficient for the contracting shipper to inform the carrier of the dangerous nature of the goods. He is also obliged to provide the carrier with information on *necessary safety measures*. What "necessary" measures means depends on the type of cargo. Public safety rules, such as the International Maritime Dangerous Goods Code (IMDG Code), contains guidelines on how dangerous goods shall be stowed and secured.

Furthermore, the first paragraph of Section 7 (§ 257) provides that information must be given in *due time*. What a timely notification means shall be decided on a case-by-case assessment, considering inter alia how the nature of the goods and the required safety measures may affect the vessel's stowage plan.[57] In many cases it is sufficient to provide notification where

[55] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.
[56] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 11), 155-156.
[57] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.

the goods are handed over to the carrier, but in other cases it must be given much earlier for the carrier to be able to prepare the necessary safety measures.[58]

Pursuant to Section 7 (§ 291), the information shall be given to the *contracting carrier and the sub-carrier* who takes delivery of the goods. There is always one contracting carrier, but there may be several performing carriers. The extended sphere of persons to which the contracting shipper owes an obligation to inform is based on the Hamburg Rules Article 13. It should however be noted that the Hamburg Rules provide that the information shall be given to the carrier *or* an actual carrier to which the contracting shipper hands over the dangerous goods. Under the Hamburg Rules, the rule is optional, whereas NMC seem to require that both the contractual *and* first actual carrier shall be informed. In Honka's interpretation, information shall be given to both.[59] He finds support in the Finnish Bill, which states that, where the goods are delivered directly to a sub-carrier, the information shall *also* be given to him.[60]

However, when reading Section 7 (§ 257) in conjunction with Section 41 (§ 291), the correct interpretation must be that the contracting shipper escapes strict liability where he has informed the carrier, be it the contracting carrier or a sub-carrier, who takes delivery of the goods. The reports of the Norwegian and Danish Maritime Committees expressly states that the contracting shipper is only obliged to provide the receiving carrier with the necessary information, as he is the party who in fact benefits from such information.[61] The Finnish Government Bill's comments on Section 41 (§ 291) are not as explicit, but states that the contracting shipper is strictly liable towards all carriers that takes the goods in their charge, but that a carrier further down the transport chain cannot invoke the strict liability where the contracting shipper has given information to the carrier taking delivery of the goods.[62] On the basis of this is it should be fairly safe to conclude that, for the purpose of the strict liability rule, the contracting shipper has fulfilled his obligation where the first carrier is informed.

NMC 13:41 (§ 291) stipulates the contracting shipper's strict liability for damage caused by cargo considered "dangerous":

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[58] ibid, 35.
[59] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 11), 156.
[60] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.
[61] NOU 1993:36 (n 43), 43; Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 76.
[62] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50.

> Section 41. Dangerous goods
>
> Where the contracting shipper has handed over dangerous goods to the carrier or to an actual carrier without informing him according to section 7 of the dangerous character of the goods and the necessary precautions, and where the person who takes over the goods does not otherwise have knowledge of their dangerous character, the contracting shipper is liable to the carrier and any actual carrier for costs and any other loss resulting from the carriage of such goods. In such a case, the carrier or the actual carrier may unload, render innocuous or destroy the goods, as the circumstances may require, without any liability to pay compensation.
>
> The provisions of paragraph 1 may not be invoked by any person who with knowledge of the dangerous character of the goods has taken them in his charge.
>
> If goods become an actual danger for person or property, the carrier may, according to the circumstances unload, render innocuous or destroy such goods without any liability to pay compensation.

The first paragraph stipulates the main liability rule and the preconditions for the contracting shipper's strict liability. Pursuant to the second paragraph, the strict liability rule shall however not apply where a carrier has been aware of the dangerous properties of the goods. Section 41 (§ 291) refers to Section 7 (§ 257) in general with regards to the contracting shipper's obligations to inform, however, "dangerous goods" in Section 41 (§ 291) has been interpreted so as to referring only to the kind of goods as mentioned under the first paragraph of Section 7 (§ 257).[63]

Where a cargo is considered "dangerous" for the purpose of NMC 13:41 (§ 291), there are two preconditions for the application of the strict liability; the contracting shipper's failure to fulfill his obligation to inform pursuant to Section 7 (§ 257) first paragraph and the carrier not being *otherwise* aware of the dangerous properties of the goods. When read together, the core requirement for the strict liability not to apply must be that the carrier shall have knowledge on the dangerousness of the goods.

Where the strict liability rule in Section 41 (§ 291) does not apply, either because the goods are not considered dangerous or because the carrier is aware of their dangerous properties, the ordinary liability rule of Section 40 (§ 290) shall be applied. In that case the carrier must prove fault or negligence on the part of the contracting shipper.

2.2.The previous Nordic maritime codes

As have already been concluded, it was not the intention of the legislator to make any material amendments to the provisions on dangerous goods in the 1994 revision of the NMC.[64] This makes case law dating from before 1994 still relevant and will thus be considered further on in the interpretation the current state of law. However, as the wording of Section 92

[63] Cf. discussion in 3.4.1.
[64] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 11), 158.

and 97 of the previous Nordic codes[65] were slightly different from the current NMC 13:7 (§ 257) and 13:41 (§ 291), it is necessary to take a brief look at the previous regulation.

After the revision of the Nordic codes in the 1930's Section 92, stipulating the shipper's duties in respect of dangerous goods, read in the following way (my translation):

> "Inflammable, explosive and other dangerous goods shall at the time of shipment be marked as dangerous, where possible, and the shipper shall give any information necessary to prevent damage.
>
> Where the shipper is aware that the transport of the goods being shipped may otherwise cause essential inconvenience to any person, ship or goods, the shipper shall also inform of this."

Section 97 set out the liability *of the shipper:*

> "If goods delivered have caused damage to the carrier or other party, the shipper has a duty to pay damages, insofar as he or someone he is responsible for are guilty of fault or neglect.
>
> If the damage is caused by inflammable, explosive or other dangerous goods, which have been loaded without the carrier having knowledge of such characteristics, the shipper is liable, even in the absence of fault or neglect".

It shall be noted that the liability and obligations were imposed on the *shipper*, i.e. the person delivering the goods to the carrier. Section 97 was however amended in the 1970's to bring the NMC more in line with the HVR in this regard.[66]

> "If goods have caused damage to the carrier or damage to the ship, *the charterer* is liable for to pay damages, if he or someone he is responsible for has been guilty of fault or neglect.
>
> If, in the case of carriage of general cargo, inflammable, explosive or other dangerous goods have been loaded without the carrier having knowledge of these characteristics, the charterer is liable for all loss which is a direct or indirect consequence of the loading of the goods, even in the absence of fault or neglect."

It was considered more appropriate then to place the *liability* on the *charterer*, as the charterer and the shipper are often the same person in general cargo carriage.[67] As already concluded, the NMC nowadays impose both obligations and liability in respect of dangerous goods on the *contracting shipper*. The provisions on dangerous goods in the previous codes were based on the HVR and the main differences to the current regulation is the specification "inflammable, explosive or other dangerous goods" in the previous codes and that there was no explicit link between the obligation to inform and the strict liability.

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[65] Finnish Maritime Code 167/1939, Swedish Maritime Code 1891:35 as amended by the Act 1936:276, Norwegian Maritime Code of 1893 as amended by Act no. 3 in 1938 and the Danish Maritime Code of 1892 as amended by Act nr. 150 in 1937.

[66] Regeringens proposition till Riksdagen med förslag till lag om ändring av sjölagen 116/1974 (Government Bill on the amendment of the Maritime Code, Finland), 7; Grönfors, *Sjölagens bestämmelser om godsbefordran* (n 43), 112.

[67] Ot.prp.nr.28 (1972–1973) Om lov om endringer i lov 20. juli 1893 nr. 1 om sjøfarten og i visse andre lover (Government Bill 28 (1972-73) on Amendment of the Maritime Code, Norway), 9.

2.3.Hague-Visby Rules

HVR Article IV paragraph 6 contains stipulations on the carrier's right and the contracting shipper's liability in connection with the shipment of dangerous goods:

> "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment…"

Under the HVR, as well as under the HR, the contracting shipper (the *shipper* pursuant to the terminology of the HVR) is strictly liable where the carrier has not consented to carrying the dangerous goods with knowledge of their nature and character. The strict liability covers goods "of an inflammable, explosive or dangerous nature".

2.4.Hamburg Rules

As already noted, the NMC have incorporated the provisions of the Hamburg Rules to the extent they do not contradict the HVR. The Hamburg Rules contain similar dangerous goods provisions as the HVR, but with some specifications. The Nordic countries have adopted the Hamburg model in respect of liability for dangerous goods. In comparison to HVR, the Hamburg Rules bring along some explicit obligations of the contracting shipper; pursuant to Article 13.1 the contracting shipper must mark or label the goods in a suitable manner and subject to Article 13.2 inform the carrier to whom the goods are handed over of the dangerous character of the goods and precautionary measures. If the contracting shipper omits his obligations and the carrier is not otherwise aware of the dangerous properties, the contracting shipper will be strictly liable. The strict liability rule under Article 13.2 reads as follows:

> "Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:
> (a) The shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and
> (b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation."

3. What goods are dangerous?

3.1.An overview

A crucial issue in the discussion on contracting shipper's strict liability is what kind of goods are considered dangerous. The distinction between dangerous and non-dangerous, or ordinary, goods is crucial as the standards of liability differ depending on the nature of the goods.

There is however no distinct line between dangerous and ordinary goods, as there is no complete and updated list of all dangerous goods. The maintenance of such a list would be difficult, if not impossible, due to the constant emergence of new chemical substances. Furthermore, some goods can become dangerous under certain circumstances only. Rather successful attempts have however been made to uphold lists of dangerous goods.

Neither the NMC nor the international carriage conventions provide any express definition of "dangerous goods". In the Nordic countries, the Government Bills on the NMC provide some guidance as to the interpretation of the notion of "dangerous goods". According to the Finnish Bill, the notion shall include all kinds of substances that may directly or indirectly cause damage to people, environment and property.[68] Further guidance for determining the dangerous nature of a particular cargo may be sought in public safety rules, such as Chapter VII of the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention), which has been enacted nationally[69], Government Decree on the Transport of Dangerous Goods in Packaged Form by Sea (DGD) and Decisions given by the Finnish Transport and Communications Agency (Traficom) pursuant to the Decree.[70] The IMDG Code, which now is a mandatory part of the SOLAS Convention, also provides important guidelines when assessing the dangerousness of a specific cargo. The most important national and international public safety rules in this context will be dealt with further in sub-chapter 3.3.

The Finnish Bill states that a substance may be considered dangerous even where it is not covered by any of the listed regulations.[71] Consequently other rules of law may also be considered when determining what goods are "dangerous". Furthermore, a factual assessment of the "dangerousness" of a particular cargo is necessary. According to the second Danish Committee Report on carriage of goods by sea, there is however a presumption of "non-dangerousness" where the specific goods cannot be found in any of the public safety rules.[72] Under the NMC a distinction must also be made between dangerous goods as referred to in 13:7.1 (§ 257.1) , and goods "of such a nature that the carriage may involve risks or essential inconvenience" pursuant to 13:7.2 (§ 257.2). This is because the latter category falls outside

[68] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.
[69] Finnish Treaty Series 11/81.
[70] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.
[71] ibid, 35.
[72] Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 44.

the scope of the strict liability rule under 13:41 (§ 291).[73] Nordic case law provides guidance as to the factual assessment of the dangerousness of a particular cargo. Foreign case law may be useful in drawing conclusions on the interpretation of the dangerous goods provisions of HVR, on which the NMC are founded. In sub-chapter 3.4, relevant case law will be analyzed to lay out the guiding principles for determining what goods are considered dangerous.

Furthermore, parties to a carriage contract may sometimes include provisions in their contract with detailed descriptions of the goods that are to be considered dangerous.[74] However, such a contractual provision may be invalid. An overview of the parties' freedom of contract in respect of liability for dangerous goods will be provided in the next.

3.2.Dangerous goods clauses in the contract

As the national and international carriage of goods regimes do not provide any definition of "dangerous", the parties to a contract of carriage may be tempted to agree on what "dangerous" shall mean for the purpose of their relationship. However, such contractual provisions may turn out to be ineffective, as the provisions of the NMC are to a large extent mandatory for the benefit of the contracting shipper, and can only be derogated from by way of increasing the liability and obligations of the carrier.[75] Even though an express definition would primarily be to the advantage of the contracting shipper, who would not have to bear the risk of misjudging the dangerousness of the goods, it is not clear whether NMC permits such derogations. However, in practice it is not very common to include such detailed definitions in contracts of carriage. From the carrier's point of view it is preferable to let the definition of "dangerous" be subject to a factual assessment in the particular case. Despite this, dangerous goods clauses can sometimes be found in time charterparties and also in bills of lading and waybills.[76] In most cases these clauses do not even purport to provide any specific or even general definition of "dangerous", but may list goods that shall *at least* be considered dangerous.[77]

[73] Cf. discussion in sub-chapter 3.4.1.
[74] Falkanger, Bull and Brautaset (n 43), 369.
[75] Cf. NMC 13:4 (§ 254)
[76] Meltem D Güner-Özbek, *The carriage of dangerous goods by sea* (Hamburg Studies on Maritime Affairs, Springer 2008), 43.
[77] See Hapag-Lloyd Bill of Lading, Terms and Conditions, Clause 19: "No Goods which are or may become dangerous, inflammable or damaging (including radioactive materials), shall be tendered to the Carrier for Carriage without his express consent in writing…". Mitsui OSK Lines Combined Transport Bill of Lading contains a similar dangerous goods clause.

3.3.Public safety regulation

3.3.1. National safety regulation in Finland

As mentioned previously, the Finnish Bill lists public safety regulations that may be consulted when assessing whether a cargo is dangerous or not.[78] This is however not an exhaustive list and also other regulations may be considered. This chapter will take a look at the most important national and international safety rules in this context.

In Finland, the general provisions on the transport of dangerous goods, irrespective of mode of transport, are gathered in the Act on Transport of Dangerous Goods (719/1994) (DGA). The Act defines "dangerous goods" in the following way:

> "*[D]angerous goods* shall mean a substance, which by hazard of explosion, inflammation, risk of infection or radiation, toxicity, corrosiveness or other such property may cause damage to people, the environment or property. The provisions of this Act on dangerous goods shall also apply to dangerous compounds, articles, devices, goods, empty packagings, genetically modified organisms and microorganisms."

This is a broad definition which includes many kinds of substances. The core of the definition is however that the substance shall be apt to cause damage to people, environment and property. Furthermore, Section 3a of the DGA provides that dangerous substances shall be divided into nine categories on the basis of degree of danger and that Traficom may issue further instructions on the classification of dangerous goods. It may be assumed that the categorization of the goods is based on the UN Recommendations on the Transport of Dangerous Goods (UN Recommendations), as these also set out nine dangerous goods classes and play an important role in setting the basis of the dangerous goods regulations for all modes of transport.[79] The UN Recommendations will be discussed briefly further on in subchapter 3.3.2. It shall however be noted that there is a crucial limitation in the scope of application of the DGA in that it does not apply to transport of goods as bulk cargo nor to transport in vessels equipped with liquid or gas tanks. This follows the limitation of the IMDG Code, which covers only goods in packaged form. There are separate regulations in respect of those kinds of transports which are outside the scope of the DGA and the IMDG.

For the purpose of carriage of (packaged) dangerous goods by sea in Finland, the DGD provides more specific provisions, however, without giving any further guidance on the interpretation of "dangerous". The DGD specifies inter alia the contracting and actual shippers'

[78] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.
[79] Lauri Railas, 'Carriage of Dangerous Goods and Law: The Case of Finland' (2006). DaGoB Publication Series 3:2006, 8.

administrative obligations to mark the goods and requirements for the marking, competence of personnel and the stowage and the securing of the goods.

Pursuant to Section 3a and 24 of the DGA, Traficom is authorized to issue regulations on technical details on inter alia the classification and marking of dangerous goods. These may provide further guidelines for the interpretation of "dangerous" in a particular case.

The national laws and provisions on the carriage of dangerous goods are to a large extent based on international conventions and regulations. In the maritime context, the SOLAS Convention Chapter VII and IMDG Code play prominent roles. SOLAS Convention Chapter VII has been implemented nationally in Finland.[80] Since 2004 the SOLAS Convention makes the application of the IMDG Code on the carriage of dangerous goods in packaged form mandatory. The other Nordic countries have corresponding national dangerous goods regulations, which also greatly are based on the international instruments.[81]

3.3.2. International safety regulation

SOLAS Convention

The first SOLAS Convention was drafted already in 1914, but never entered into force.[82] It did however not contain any provisions on the carriage of dangerous goods, and neither did the 1929 SOLAS Convention, which entered into force in 1933. In the 1948 SOLAS Convention Chapter VI however specifically governed the carriage of dangerous goods. Chapter VI Regulation 3 listed types of goods, such as explosives, corrosives and poisons, which was considered dangerous and prohibited the carriage if such goods unless carried in accordance with the convention. Some dangerous goods were allowed for carriage provided necessary adequate safety measures were undertaken. Furthermore, the shipper was obliged to provide the carrier with a written statement on the dangerousness classification of the goods. The goods were also to be marked as dangerous. Each contracting state was obliged to issue more detailed national rules on the packing and stowage of dangerous goods.

[80] Finnish Treaty Series 11/81.
[81] Sunniva Frislid Meyer, 'Regelverk for transport av farlig gods på vei versus til sjøs' (Oslo 2013) 1254/2013, 3; Swedish Transport Agency (Transportstyrelsen), 'Förpackat farligt gods' <https://www.transportstyrelsen.se/sv/sjofart/Miljo-och-halsa/Gods-last-avfall/Forpackat-farligt-gods/> accessed 16 July 2019
[82] International Maritime Organization, 'Focus on IMO: SOLAS: the International Convention for the Safety of Life at Sea, 1974' (1998) <http://www.imo.org/en/OurWork/Safety/Regulations/Documents/SOLAS98final.pdf%20International%20Convention%20for%20the%20Safety,%20of%20Life%20at%20Sea,%201974%20(October%201998).pdf> accessed 13 October 2019

The true impact of the SOLAS Convention came in 1960, when the International Maritime Organization (IMO) had been established and been given the assignment of developing maritime safety legislation.[83] In connection with the adoption of the fourth SOLAS Convention, which was a completely new instrument, several Resolutions were adopted by the IMO.[84] One of these requested the IMO to develop uniform rules on the carriage of dangerous goods by sea. The Resolution resulted in the IMDG Code in 1965. The IMDG Code will be dealt with further on.

Part A of Chapter VII of the SOLAS Convention covers the carriage of goods in packaged form and contains provisions on inter alia the classification, packing, marking, labelling and stowage of the goods. Pursuant to Regulation 2.3 the carriage of dangerous goods is prohibited unless it is carried in accordance with the convention. In part A dangerous goods are defined as substances, materials and articles covered by the IMDG Code.[85] Furthermore, Chapter VII requires that relevant parts of the IMDG Code shall be complied with when carrying dangerous goods.[86]

Part A-1 in turn deals with dangerous goods in solid form in bulk and includes provisions on documentation, stowage and segregation of such goods. Part B covers requirements on how ships carrying dangerous liquid chemicals in bulk shall be equipped and construed. Furthermore, it requires chemical tankers to comply with the International Bulk Chemical Code (IBC Code). Part C is concerned with the construction and equipment of ships carrying liquified gases in bulk and that these shall fulfill the requirements of the International Gas Carrier Code (IGC Code). Finally, part D includes requirements on the carriage of packaged irradiated nuclear fuel, plutonium and high-level radioactive wastes on ships. Pursuant to part D, ships carrying such substances are required to comply with the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code).

Chapter VII of the SOLAS Convention thus contains provisions on various types of dangerous goods carried in different forms. These provisions may help determining whether a particular cargo is dangerous or not. However, the IMDG Code plays a prominent role in providing a comprehensive list of packaged dangerous goods and a classification of the goods into

[83] ibid, 2.
[84] ibid.
[85] SOLAS Convention, Chapter VII, Regulation 1.
[86] SOLAS Convention, Chapter VII, Regulation 3.

nine categories with special handling requirements. The IMDG Code list of dangerous goods is also decisive for the definition of dangerous goods in Parts A and A-1 and of "INF cargo" in Part D.[87] Furthermore, the IMDG Code is referred to in the International Convention for the Prevention of Pollution from Ships (MARPOL Convention) for the purpose of defining "harmful substances".[88] The IMDG Code will therefore be dealt with in more detail.

IMDG Code

The IMDG Code was adopted in 1965 by the IMO Assembly. Since the 2004 SOLAS the IMDG Code has been mandatory for all ships within the convention's scope of application.[89] This means that ships flagged in the Nordic countries, and all other contracting states, are now bound by the provisions of the IMDG Code.

The contents of the IMDG Code are based on the UN Recommendations, which was issued for the first time in 1956 as a report by the Committee of Experts on the Transport of Dangerous Goods (CETDG) of the United Nation Economic and Social Council (ECOSOC), waiting for the IMO to become operative and to respond to the an urgently increasing need of uniform rules in the carriage of dangerous goods.[90] The UN Recommendations are aimed at providing a general framework for the carriage of dangerous goods in all modes of transport by presenting "Model Regulations on the Transport of Dangerous Goods".[91] The Model Regulations contains inter alia principles of classification of dangerous goods, listings of dangerous goods, general packing requirements and rules on marking, labelling or placarding.

The IMDG Code consequently sets out provisions on inter alia classification, packaging, marking and labeling of packaged dangerous goods carried by sea. In order to keep the Code in line with the provisions of the UN Recommendations, it is revised biennially.[92] The IMDG Code allocates dangerous goods into nine classes depending on the type of danger they represent.[93] Chapter 3.2. of the Code contains a Dangerous Goods List, listing all goods which

[87] Cf. Regulations 1, 7 and 14 of Chapter VII of SOLAS Convention.
[88] MARPOL Convention, Annex 3, Regulation 1.
[89] Resolution MSC 122 (75)
[90] Güner-Özbek (n 76), 12.
[91] UNECE, 'About the Recommendations: UN Model Regulations' <https://www.unece.org/?id=3598> accessed 3 November 2019.
[92] Swedish Transport Agency (Transportstyrelsen), 'The IMDG Code' <https://www.transportstyrelsen.se/en/shipping/Environmental-protection/Freight--Cargo/Bulk-Cargoes/The-IMDG-Code/> accessed 22 July 2019
[93] The classes are the following: Class 1 – Explosives, Class 2 – Gases, Class 3 – Flammable liquids, Class 4 – Flammable solids and other flammable substances, Class 5 – Oxidizing substances and Organic peroxides,

are classified as dangerous and their specific handling requirements. However, not all substances and articles are listed by name. There are also entries for groups of substances.[94] Each class has its own definition, which should assist in determining whether a particular substance is dangerous and to what class it should be assigned. Goods classified as dangerous are given UN Numbers and Proper Shipping Names (PSN).[95] The IMDG Code provides both general and more specific technical instructions on how dangerous goods shall be packaged, labelled and marked. Pursuant to 2.0.0.1. of the IMDG Code (Amendment 38-16) the classification of the goods shall be made by the shipper or, where specified in the code, the competent authority of the member state. The Code also requires the shipper to issue a dangerous goods declaration, whereby it is stated that the goods are properly packaged, marked and labelled, and in proper condition for the transport pursuant to applicable regulations.[96]

3.3.3. Summary on the discussion on public safety regulation

There are a range of national and international regulations on the carriage of dangerous goods by sea. These set out administrative rules aimed at promoting the safety of ships and shipping operations and protecting human life, environment and property. Even though these are not primarily aimed at governing the distribution of obligations and liability between the parties to a contract of carriage, these provide useful guidelines for the determination of what constitutes "dangerous goods" pursuant to the strict liability rule under NMC 13:41 (§ 291). All these sets of rules after all have the common purpose to prevent damage caused by the carriage of dangerous goods. However, the public safety regulations only provide interpretational guidance, and a cargo can presumably be considered non-dangerous for the purpose of NMC 13:41 (§ 291) despite being listed as dangerous. On the contrary, a cargo can also be defined as dangerous even where it is not included in any dangerous goods lists.[97] In the

Class 6 – Toxic and infectious substances, Class 7 – Radioactive material, Class 8 – Corrosive substances, Class 9 – Miscellaneous dangerous substances and articles.

[94] See IMDG Code Amendment 38-16, 2.0.2.2. The four type of entries in the Dangerous Goods List are 1) single entries for well-defined substances or articles 2) generic entries for well-defined groups of substances or articles 3) specific N.O.S .entries covering a group of substances or articles of a particular chemical or technical nature and 4) general N .O .S .entries covering a group of substances or articles meeting the criteria of one or more classes.

[95] IMDG Code (Amendment 38-16), 2.0.2.1.

[96] IMDG Code (Amendment 38-16), 5.4.1.6.1.

[97] Hugo Tiberg, 'Legal Survey' in Kurt Grönfors (ed), *Damage from Goods* (Skrifter/ Sjörättsföreningen i Göteborg vol 58. Akademiförlaget 1978), 17, where it is stated that: "On the other hand the IMDG list of dangerous goods can hardly be taken to be exclusive in the sense of relieving the shipper of liability if he has dug up some new kind of cargo, not listed in IMDG, which has manifestly dangerous characteristics. And if goods are shipped from a country where the shipment is not governed by IMDG, the questions… must be decided quite independently of IMDG."

end the determination of what cargo is considered dangerous must be based on a factual assessment of the properties of the goods.

3.4. Factual assessment of the dangerousness of the goods

3.4.1. Assessment of the dangerous nature and state of the goods

The preparatory works to the NMC provide that a particular substance may be considered dangerous even where it is not listed in any public safety regulation.[98] The report of the Norwegian Maritime Committee makes clear that the public safety rules listing dangerous goods are *not exhaustive or decisive*.[99] This implies that a factual assessment of the dangerousness of the goods shall be conducted in all cases, both where goods are listed as dangerous and where they are not. However, the Danish Committee Report provides that the non-listing of a particular substance constitutes a presumption of non-dangerousness.[100] Given the extensive work with revising the IMDG Code to keep pace with the constant emergence of new substances, it is reasonable to give the instrument this interpretational significance.

Nordic case law supports the conduct of a factual assessment of the goods' dangerousness. In the case ND 1941.353 Else (DCC) the court reasoned that a cargo of steel shavings was dangerous, even though not generally considered having dangerous properties. The cargo self-heated during sea carriage, probably due to remains of oil and twist in the cargo in combination with the cargo being wet. In ND 1954.364 Florø (NCC) the court found a cargo of ferro-silicon being dangerous due to its ability to emit noxious gases when becoming humid, even though it is not normally considered dangerous. In ND 1959.55 Grethe (NCC) the court conducted a detailed analysis on the interpretation of "dangerous goods" in Section 92.1 of the previous maritime code (today's 13:7.1, § 257.1). It concluded that the definition included goods which in the actual case are dangerous, irrespective of whether they would be considered dangerous in other conditions. To adopt the terminology of Brækhus, it could be more appropriate to talk of the "dangerous state" of the goods. According to him, "state" means that the goods possess properties which derogate from what can normally be expected from the type of goods.[101] However, this change of terminology would risk extending the

[98] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden), 219; NOU 1993:36 (n 43), 25; Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 44.
[99] NOU 1993:36 (n 43), 25.
[100] Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 44.
[101] Sjur Brækhus, 'Sjøtransportørens ansvar for lasteskader' in Peter Wetterstein and Anders Beijer (eds), *Essays in honour of Hugo Tiberg: Professor of maritime law* (Norstedts juridik AB 1996), 103.

scope of NMC 13:41.1 (§ 291.1) to goods that are not inherently dangerous, which in principle would mean than any kind of cargo could pose danger if handled incorrectly. For a separate liability rule on damage caused by "dangerous goods" to make sense, the danger must be linked to the properties of the goods. The distinction between "dangerous goods" and ordinary goods which may cause damage under Nordic law will be further discussed in sub-chapter 3.4.2.

3.4.2. The distinction between inherently dangerous and semi-dangerous goods

In the general understanding of the notion "dangerous goods" the danger is connected to the inherent nature of the goods. However, the danger is often triggered by surrounding circumstances, such as the goods coming in contact with other substances or humidity. Furthermore goods, such as contraband, may cause delay to the ship and cargo onboard without posing a physical danger to the property. Shall such dangerous situations fall within the scope of the contracting shipper's strict liability?

In NMC a distinction has been made between "proper" dangerous goods, as referred to in NMC 13:7.1 (§ 257.1), and other goods of such a nature that the carriage may involve risks or essential inconvenience pursuant to NMC 13:7.2 (§ 257.2). In the following discussion the goods under the first paragraph of NMC 13:7 (§ 257) will be referred to as "inherently dangerous goods", whereas goods under the second paragraph will be defined as "semi-dangerous". The Finnish and Swedish preparatory works to the maritime codes explicitly state that semi-dangerous goods do not confer a strict liability on the contracting shipper.[102] In Norway, one needs to go back to the preparatory works to the 1938 revision of the maritime code to find any guidance. It is stated therein that goods which may cause damage without having dangerous characteristics, such as contraband and goods that are subject to embargo, are covered by the ordinary, fault-based, liability rule.[103] In Denmark, the second paragraph of Section 257 was not introduced in the code until 1994. The preparatory works to the 1994 DMC do not specify whether this shall be covered by the strict liability rule. As the report from the Danish Maritime Law Committee states that the provision is modelled on the

[102] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50; Committee Report on Carriage of Goods by Sea, Sweden (Statens offentliga utredningar SOU 1990:13) (n 43), 160.
[103] Innstilling av 7 mai 1936 fra den kgl. kommisjon til revisjon av Innstilling av 7 mai 1936 fra den kgl. kommisjon til revisjon av sjøfartsloven (Report from the Maritime Law Committee), 41.

Norwegian and Swedish codes, it may be assumed that the Danish law shall be interpreted in the same way.

Where the strict liability of the contracting carrier was introduced in the Nordic maritime codes in the 1930's, the notion of dangerous goods was based on the Hague understanding of "dangerous".[104] However, under the pre-Hague Nordic maritime codes, the "dangerous" concept had been wider, including also e.g. contraband.[105] This broader meaning was upheld by adding a second paragraph to NMC 13:7 (§ 257). However, the construction of the strict liability rule in Section 97 (today's 13:41/§ 291) under the 1930´s Nordic codes made it clear that it did not apply to semi-dangerous goods as referred to in the second paragraph. There was no link between the strict liability under Section 97 and the obligation to inform under Section 92, as it is today, but both Section 97 and Section 92.1, used the same expression "inflammable, explosive or other dangerous goods". This must mean that only inherently dangerous goods pursuant to the first paragraph of today's NMC 13:7 (§ 257) fall within the scope of the contracting shipper's strict liability.

It is however not easy to draw a distinct line between the two categories of goods under NMC 13:7 (§ 257), as "dangerous" for the purpose of NMC 13:7.1 (§ 257) is not expressly defined. As already concluded, "dangerous" in the context of NMC 13:7.1 (§ 257) shall be interpreted in line with the HR/HVR notion of "dangerous". From the wording of the NMC 13:7 (§ 257), it must be understood that the first paragraph comprises *inherently* dangerous goods, whereas under NMC 13:7.2 (§ 257.2) the danger is more linked to surrounding circumstances. The first paragraph uses the phrase "dangerous goods" where the other paragraph refers to goods which "carriage may involve risks or essential inconvenience", indicating that the danger lies not with the goods itself. The second category is not only restricted to dangers, but also includes essential inconvenience that the carriage may cause. It is further stated that the risks and inconvenience shall be directed at persons, ship or cargo. According to the Finnish Bill and the Norwegian and Danish preparatory works[106] the second category, i.e. semi-dangerous goods, includes inter alia contraband and goods leading to embargo.[107]

[104] Grönfors, *Sjölagens bestämmelser om godsbefordran* (n 43), 102.
[105] ibid, 102; Peter Lødrup, 'Befrakters og avlasters ansvar for farlig last' (Nordic Maritime Law Seminar in Oslo 13-15 June 1966, Scandinavian Institute of Maritime Law), 2-3.
[106] Innstilling av 7 mai 1936 fra den kgl. kommisjon til revisjon av Innstilling av 7 mai 1936 fra den kgl. kommisjon til revisjon av sjøfartsloven (Report from the Maritime Law Committee) (n 103), 39 f.; Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 44 f.
[107] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35.

The Swedish Government Bill (Swedish Bill), however, also mentions substances that may turn dangerous in combination with other circumstances, such as other products or increased temperatures, as examples of semi-dangerous goods.[108] In my opinion, this statement is confusing, as also the inherent danger of the most obvious "dangerous" cargo, such as explosives, is generally triggered by some external factor, such as heat. In my interpretation of the Nordic preparatory materials, a cargo possessing dangerous properties, even though activated under special conditions only, may still be considered inherently dangerous for the purpose of NMC 13:7.1 (§ 257.1). Further support for this reasoning can be found in the Danish Committee Report 2, which states that the second paragraph may come into play when normally innocent cargo becomes dangerous in combination with certain other goods, *insofar the first paragraph of § NMC 13:7 (§ 257) is not applicable.*[109]

Norwegian case law shows that in the factual assessment consideration will be taken to whether the particular cargo had inherent properties, which in combination with external factors, gave rise to the danger. In ND 1941.353 Else (DCC) a cargo of steel shavings, which under ordinary circumstances was not considered dangerous, was deemed so for the purpose of the strict liability rule due to its propensity of self-heating. This specific characteristic was caused by a combination of remains of oil-contaminated cotton waste in the cargo and moisture contents. In ND 1954.364 Florø (NCC) the court established the dangerousness of a cargo of ferro-silicon, even though it is not normally considered dangerous. The cargo had become humid before loading due to precipitation, causing the cargo to emit noxious gases, which in turn led to the death of two crew members.

The distinction between situations where the danger is caused by the inherent properties of the goods and by external factors is however not clear-cut. Each case must be assessed on its own merits. In my opinion, it is reasonable to assume that the goods shall be considered dangerous for the purpose of NMC 13:7.1 (§ 257.1) and within the scope of the strict liability rule where the danger is principally linked the inherent properties of the goods.[110] However, the preparatory works to the NMC makes clear that non-physically dangerous goods, such as contraband, is outside the scope of the strict liability rule.

[108] Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 219.
[109] Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 45.
[110] Cf. discussion in Mats Segolson, 'Damage from Goods in Sea Carriage: The Sender's Liability against the Carrier and the Other Owners of Cargo on Board' (Master's thesis, University of Uppsala 2001), 12.

As a comparison, at common law, the courts have included within the scope of the contracting shipper's strict liability not only inherently and physically dangerous goods but also situations where the danger is found in a) the surrounding circumstances and b) where the goods do not pose a physical danger to the ship or other cargo.[111] In the reasoning of Mustill J. in the *Athanasia Comninos*[112] the contractual description of the goods was tied to the assessment of whether the goods was dangerous or not. Mustill J. argued that the contractual description of the goods shall be considered when determining what risks the carrier has accepted when agreeing to carry the goods. In that particular case, the court found against the carrier, as the carrier had agreed to carry a cargo of coal, which was generally known to be liable to emit methane gas, which in turn could cause an explosion. The same reasoning was applied in *General Feeds Inc.* v. *Burnham Shipping Corporation (The Amphion)*[113], where a cargo of bagged fishmeal ignited during carriage. However, in that case the charterer was found liable for the damage as the carrier was not considered having accepted the inherent risk of the cargo. This was due to the fact that the cargo was described in the contract as "anti-oxidant treated bagged fishmeal", whereas it was in fact untreated. Bagged fishmeal, which has not been anti-oxidant treated is listed under Class 4.2. of the IMDG Code (Amendment 38-16) due its ability to propensity to build up heat. In *Mitchell, Cotts & Co. v. Steel Bros & Co. Ltd*[114] the court found that unlawful cargo, in this case a cargo requiring governmental permission to be discharged at the destination, which may cause delay or seizure of the vessel, was considered on a par with dangerous goods for the purpose of the contracting shipper's strict liability. The English common law definition of "dangerous" thus appears to be broad and include also goods that do not possess physically dangerous properties. However, under English case law relating to the HVR Article IV.6 the scope of application of the contracting shipper's strict liability has in principle been limited to physically dangerous goods.[115] There however seems to be room for including situations where there is an indirect risk of physical damage due to delay, e.g. because the cargo may cause the ship or cargoes

[111] Girvin (n 23), 494.
[112] *The Athanasia Comninos & Georges Chr. Lemos (The Athanasia Comninos)* [1990] 1 Lloyd's Rep 277.
[113] *General Feeds Inc.* v. *Burnham Shipping Corporation (The Amphion)* [1991] 2 Lloyd's Rep 101.
[114] *Mitchell, Cotts & Co. v. Steel Bros & Co*. Ltd [1916] 2 KB 610.
[115] Wafi N Abdul Hamid, 'Loss or Damage from the Shipment of Goods, Rights and Liabilities of the Parties to the Maritime Adventure' (Dissertation, University of Southampton 1996), 219. See also *Effort Shipping Co. Ltd c. Linden Management S.A. and another (The Giannis NK)* [1994] 2 Lloyd's Rep 171. In the Giannis NK a cargo of ground-nut infested by Khapra beetles was considered dangerous, as it was liable to cause damage to other cargo onboard. The infested cargo could not be discharged in the US and had to be dumped at sea together with other cargo onboard. In that case it was also ruled that the carrier was not precluded from invoking the common law remedy relating to non-physically dangerous goods.

to become subject to detention or expropriation.[116] Furthermore, in English case law it has been submitted that the intrinsic properties of the goods is only one factor to consider when determining whether the goods are dangerous. The carrier's knowledge of the characteristics of the goods, and the way he handles them in the light of this knowledge, is also relevant.[117]

In comparison to the interpretation of the HR/HVR Article IV.6 under English law, the NMC definition of "dangerous" appears to be more limited. At least non-physically dangerous goods, such as contraband, are excluded from the scope of the strict liability. Where external factors alone has given rise to the danger, the contracting shipper will most likely not be strictly liable. The strict liability is thus primarily confined to physically and inherently dangerous goods, even though account is also taken of situations where external factors have contributed to a lesser extent to the damage. It appears that the carrier's knowledge of the goods' characteristics is of no relevance to the dangerousness assessment, as under English law.

3.4.3. The nature and degree of danger required

The previous sub-chapter concluded that "dangerous goods" under NMC 13:7.1 (§ 257.1) and 13:41 (§ 291) shall be restricted to *physically* dangerous goods. This means that they shall be liable to cause physical damage to other property, people and environment.[118] The ship does not necessarily have be at risk. This is shown by the judgment in ND 1954.364 Florø (NCC). In the case a cargo of ferro-silicon was considered dangerous as it emitted noxious gases when becoming humid. The gases caused the death of two crew members. It was considered that the danger directed at human-beings only was sufficient to trigger the strict liability rule. This means that contamination by other goods onboard, considered inherently dangerous, also falls within the ambit of the contracting shipper's strict liability.

Does the strict liability rule require a certain degree of danger to exist? The NMC or their preparatory materials do not provide any guidance. This issue has however been discussed in both Nordic and international doctrine. Tetley has asserted that the danger must be of such a significance that it may lead to the capsizing of the ship.[119] This is probably not the case under Nordic law. Firstly, this is not in line with the interpretation in ND 1954.364 Florø

[116] ibid, 221. Abdul Hamid in this context gives *Nobel's Explosives* v *Jenkins* [1896] 2 Q.B. 326 as an example.
[117] ibid, 221-222.
[118] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 219.
[119] William Tetley, *Marine cargo claims* (4. udg, Les Éditions Yvon Blais Inc 2008), 1118.

(NCC) as outlined above. Furthermore, in ND 1959.55 Grethe (NCC) the court found that a cargo of hot ore residues was dangerous even though the fire caused damage to the cargo holds only, without threating the safety of the ship. Another example is provided by ND 1998.167 Leopold (DSC), where the contracting shipper was strictly liable for corrosion damage caused to the ship during transport of battery waste. With regards to the required degree of danger, Falkanger, Bull and Brautaset however suggests that there must be more than an everyday risk, meaning that the potential for damage must be significant.[120]

3.5.Conclusions

The main conclusion of Chapter 3 is that it is difficult to draw a distinct line between inherently dangerous goods under NMC 13:7.1 (§ 257.1) and semi-dangerous goods under NMC 13:7.2 (§ 257.2). Furthermore, the factual assessment entails an unpredictability for the contracting shipper, as the dangerousness of goods is always assessed in hindsight. Even though the evaluation shall focus on the goods' *potential* of causing damage at the time of shipment it must be admitted that courts may be inclined to consider a cargo dangerous where the damage has already occurred.[121] This is problematic from the contracting shipper's point of view, especially as a strict liability has been placed on his shoulder. The unpredictability issue will be developed further in sub-chapter 6.6 in connection with the critical study of the strict liability rule.

4. The contracting shipper's failure to inform and the carrier's unawareness

4.1.The relationship between the two preconditions for strict liability

In the current wording of NMC 13:41 (§ 291), first paragraph, two preconditions must be met for the contracting shipper to be strictly liable for damage caused by goods classified as dangerous. The first condition is that the contracting shipper shall have failed to fulfill his obligation to inform the receiving carrier of the dangerous nature and necessary safety measures. Secondly, the receiving carrier shall not *be otherwise* aware of the dangerous nature of the goods. The contracting shipper will not be strictly liable where only one condition is met. The strict liability is thus not a direct sanction for the contracting shipper's breach of his obligation to inform. He can still be relieved of the strict liability where the carrier is otherwise aware of the dangerous nature when taking the goods in his charge.

[120] Falkanger, Bull and Brautaset (n 43), 368.
[121] Segolson (n 110), 11-12.

It is impossible to keep the analyses of these preconditions for liability entirely separate. They are naturally intertwined, as the fulfillment of the contracting shipper's obligation to inform and the carrier's awareness will go hand in hand. In this chapter the meaning of the two preconditions will initially be discussed separately, and then an analysis of the combination of them will be undertaken.

4.2.The contracting shipper's obligation to inform

4.2.1. An overview of the legal issues relating to the obligation to inform

Pursuant to NMC 13:7 (§ 257), the contracting shipper is not only obliged to inform the carrier and sub-carrier on the *dangerous properties* of the goods, but also on necessary *safety measures* for the handling of the goods. Furthermore, the contracting shipper shall suitably mark the goods as dangerous. However, pursuant to the wording of NMC 13:41 (§ 291), first paragraph, the contracting shipper's strict liability is however only triggered by his failure to inform. The suitable marking of the goods will however impact on the carrier's awareness of the dangerous nature of the goods, and thus indirectly on the applicability of the contracting shipper's strict liability. The relevance of the marking of the goods as dangerous will be considered further in 4.2.5. With regards to the contracting shipper's obligation to inform of necessary safety precautions, the discussion in 4.2.4. will reveal that the failure to fulfill that part of the obligation will not have any bearing on the applicability of the strict liability rule. Furthermore, the construction of the current liability model, where the strict liability is tied to both the contracting shipper's failure to inform and the carrier's unawareness of the dangerous properties of the goods, may appear peculiar for several reasons. Firstly, one may ask whether the strict liability is triggered only where the contracting shipper has failed to inform of dangerous properties that he was aware or ought to be aware of? Or put another way, does NMC 13:7 (§ 275) and NMC 13:41 (§ 291) provide for a genuine obligation to inform or is it more of a risk of non-information that the contracting shipper carries? This will be discussed in sub-chapter 4.2.2. Secondly, sub-chapter 4.2.3. will analyze the whether the failure to inform as a precondition for strict liability has any independent function. In the end, the core precondition for strict liability to apply is that the receiving carrier must be unaware of the dangerous nature of the goods. And vice versa, where the receiving carrier is aware of the dangerous nature of the goods, either by means of information received from the contracting shipper or otherwise, the strict liability rule will never apply.

4.2.2. Obligation to inform or risk of non-information?

In the ordinary understanding of an "obligation to inform", the duty is restricted to information that the obliged person in fact possesses. It goes without saying that it is impossible to inform of anything that one is not aware of. However, NMC 13:7 (§ 257) does not specify that the obligation to inform shall be confined to dangerous characteristics of the goods that the contracting carrier is aware of. Neither do the preparatory materials.

Given that NMC 13:41 (§ 291) imposes a *strict* liability on the contracting shipper where he has failed to fulfill his obligation to inform pursuant to 13:7 (§ 257), it is reasonable to assume that the intention has been that no account shall be taken to what the contracting shipper knew or ought to have known of the goods' properties. The distinctive feature of a strict liability is that liability will ensue even in the absence of negligence or intent. The liability is "objective" in the sense that subjective circumstances on the side of the liable party are not relevant. If NMC 13:7 (§ 257) would be interpreted so as to contain a genuine obligation to inform, the assessment of the applicability of the strict liability rule would require subjective considerations with regards to what the contracting shipper knew or ought to have known of the goods, and therefore could have informed of. In that case the liability would be more of a "control liability".

Reading 13:7 (§ 257) and 13:41 (§ 291) in conjunction, it must be concluded that the obligation is more likely a "risk of non-information"[122] carried by the contracting shipper, rather than a genuine obligation to inform. The contracting shipper will be strictly liable even where he did not know of the dangerous properties of the goods. In ND 1941.353 Else (DCC) it was also concluded by the court that NMC 13:41 (§ 291) does not take any account of the contracting shipper's lack of knowledge of the nature of the goods.

In my opinion, the expression "obligation to inform" is thus somewhat misleading, at least for the purpose of the strict liability rule under NMC 13:41 (§ 291). Despite this, the expression will be used further on in the thesis to describe the first precondition for strict liability under NMC 13:41 (§ 291).

[122] The term "risk of non-information" is borrowed from Cecilia Grue, 'Transport av farlig gods. Ansvar og særregler ved stykkgodstransport.' [1998] MarIus 238, 60 f.

4.2.3. The failure to inform as a separate precondition for strict liability

The first precondition for strict liability, i.e. the contracting shipper's failure to inform of the dangerous nature of the goods, appears superfluous, as it will have no independent relevance where the carrier is *otherwise* aware of the dangerous nature of the goods. In that case the second precondition for strict liability will not be met, and the strict liability will not apply. Furthermore, where the contracting shipper has given the required information to the carrier, the carrier will naturally be aware of the dangerous nature of the goods. Then none of the preconditions for strict liability will apply. So in what situations does the non-fulfillment of the obligation to inform, as the first precondition for strict liability, have any independent function?

The preparatory works to the NMC and the Hamburg Rules, on which NMC 13:41 (§ 291) is modelled, may help tracing the purpose of the current construction of the strict liability rule. Before the 1994 revision of the Nordic maritime codes, the contracting shipper's strict liability for dangerous goods was not linked to his obligation to inform, only to the carrier's unawareness.[123] In my view, that construction made more sense. The preparatory materials however state that the link between the obligation to inform and the strict liability in the Hamburg Rules article 13.2 was established to cover sub-carrier situations.[124] Given the way in which NMC 13:41 (§ 291) is construed, I however question whether the separate precondition in respect of the contracting shipper's failure to inform brings any additional value to the strict liability rule. I would to the contrary assert it only results in more complexity in the application of the rule. In my view sub-carrier situations would be covered to the same extent, would the prime precondition for strict liability be the unawareness of the carrier to whom the goods are delivered.

It has already been concluded that, pursuant to NMC 13:7 (§ 257), the contracting shipper is only obliged to inform the carrier to which he delivers the goods, be it the contracting carrier or a sub-carrier.[125] When reading NMC 13:41 (§ 291) it must be assumed that the "*the person who takes over the goods*", which pursuant to the second precondition for strict liability must not be otherwise aware of the dangerous nature of the goods, also refers to the carrier to

[123] Section 97.2 (today NMC 13:41/§ 291) read: "If the damage is caused by inflammable, explosive or other dangerous goods, which have been loaded without the carrier having knowledge of such characteristics, the shipper is liable, even in the absence of fault or neglect".
[124] Cf. Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50; NOU 1993:36 (n 43), 43; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 250.
[125] See discussion in Chapter 2.1.4.

whom the goods are first delivered.[126] As both preconditions for strict liability refers to the same person, i.e. the receiving carrier, the core precondition for the contracting shipper's strict liability will always be that the receiving carrier must not be aware of the dangerousness of the goods. Where the contracting shipper has informed the receiving carrier, none of the preconditions for strict liability will be met. Where the contracting shipper has failed to inform the receiving carrier, but the latter is otherwise aware of the goods' dangerous nature, strict liability will not apply either, as the second precondition is not met.[127] Furthermore, where the preconditions for strict liability under NMC 13:41.1 (§ 291.1) are not fulfilled, strict liability will also be excluded towards carriers in the transport chain. The second paragraph of Section 41 (§ 291) will furthermore ensure that the (original) contracting shipper's strict liability cannot be invoked by a later carrier who is aware of the dangerous nature of the goods, even though the preconditions of the first paragraph are fulfilled.[128]

In the light of the above analysis, the precondition in respect of the contracting shipper's failure to inform appears redundant. In my view, the second precondition on the unawareness of the receiving carrier, in combination with the second paragraph of NMC 13:41 (§ 291), would lead to the same end results, also in sub-carrier situations. The current construction of the strict liability is thus overly complex and not very successful. The criticism will be further developed in sub-chapter 6.3.

4.2.4. Relevance of the obligation to inform of safety precautions

NMC 13:7 (§ 257) not only requires the contracting shipper to provide the carrier with information on the dangerous nature of the goods, but also on necessary safety precautions. However, given the wording of NMC 13:41 (§ 291), it is not fully clear whether failure to fulfil this part of the obligation to inform will trigger the strict liability of the contracting shipper. The first precondition for strict liability provides that the contracting shipper shall have handed over the goods to a carrier without informing him of the *dangerous character of the goods and of the necessary safety precautions*. The second precondition requires that the same carrier was not otherwise aware of the *dangerous nature of the goods.* There is consequently no full correlation between the two preconditions.

[126] Cf. Grue (n 122), 70-71.
[127] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 250.
[128] NOU 1993:36 (n 43), 43.

The first question of interest is whether strict liability will ensue where the contracting shipper has informed of the dangerous nature of the goods, but not of the necessary precautionary measures. In a strict reading of the current wording, the *first precondition* for strict liability is met. However, this issue is also connected to the question of whether there is general duty of care of the carrier that requires him to make his own investigation on the necessary safety precautions where he is aware of the dangerous nature of the goods. This will be discussed in more detail in sub-chapter 4.3. At this stage it may however be concluded that, at least as a starting point and where there is causation between the failure to inform of necessary safety measures and the damage, the first precondition for strict liability has been met where the contracting shipper has only informed of the dangerous nature.

In the above example, the *second precondition* for strict liability is however not met as the carrier will be aware of the dangerous nature of the goods where the contracting shipper has fulfilled that part of his obligation to inform. This means that a failure to provide information on the needed safety precautions is in practice without relevance for the applicability of the contracting shipper's strict liability. So why has the obligation to inform of safety precautions been included in NMC 13:41 (§ 291)? That is the other interesting question. From the exact wording of the section, the construction appears as an artificial sanction for the failure to inform of necessary safety precautions. This further highlights the difficulties in combining an obligation to inform and a strict liability, which will be discussed in sub-chapter 6.3.

4.2.5. Sufficient notice of the dangerous nature

The NMC do not contain any detailed requirements on the form or contents of the information the contracting shipper shall provide the carrier with. Neither do the preparatory materials provide any guidance. It must therefore be assumed that the information can be given in any form. Furthermore, it is reasonable to expect that the information shall be presented in such a way that an experienced and skillful carrier may appreciate the nature of the risk.[129] The contracting shipper thus carries the risk that the information has been received and understood by the carrier.

With regards to the freedom of form, the contracting shipper's obligation to suitably mark the goods as dangerous pursuant to NMC 13:7.1 (§ 257.1) may possibly be of relevance for the question whether the contracting shipper has fulfilled the obligation to inform. This issue

[129] Julian Cooke, *Voyage charters* (Lloyd's shipping law library, 4th. ed. Informa Law from Routledge 2014), 178.

will be considered further on in this sub-chapter, after having had a look at the suitability requirement and the standards for marking the goods under public safety regulations.

The obligation to mark the goods as dangerous is an absolute one, compared to the previous maritime codes, where the marking should be done "where possible".[130] The section does not specify how the goods shall be marked in order to fulfill the "suitably" requirement. The legislator has deliberately chosen not to specify this, as the ways of marking the goods may vary depending on the type of goods.[131] Where there are administrative rules on the marking of a specific goods, these shall be followed.[132] The IMDG Code contains provisions on how packaged dangerous goods shall be marked and labelled. Pursuant to chapter 5.2 of the code the PSN and the UN Number shall be displayed on each package. There are also requirements regarding the use of specific danger labels for goods specifically listed in the Dangerous Goods List.[133] At least a primary risk label, indicating the danger class, shall be attached to the package. However, sometimes also subsidiary risk labels shall be used to reflect further risks inherent in the goods. Additional markings and symbols may be used to highlight certain precautions to be taken when handling the package, such as an umbrella indicating that the package is susceptible to water.[134]

The purpose of marking and labelling the goods is logically to inform all persons involved in the carriage of the goods' special nature and the handling required to minimize the danger that the goods pose. It is therefore reasonable to assume that the use of marks and label may in some situations be sufficient to fulfill the contracting shipper's obligation to inform. However, according to the Norwegian preparatory works to the NMC, the contracting shipper's obligation to inform under 13:7 (§ 257) is contractual and may be more extensive than the obligations imposed by public safety regulations, such as the IMDG Code.[135] Firstly, the public safety regulations are not exhaustive in their listing of dangerous goods. Secondly,

[130] The exact wording of Section 92.1 of the Finnish Maritime Code of 1939 (167/1939) read as follows: "Gods av lättantändlig, explosiv eller eljest farlig beskaffenhet skall vid avlämnandet, om möjligt, vara märkt som farligt; och give avlastaren de upplysningar, som äro erforderliga till förebyggande av skada."
[131] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 35; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 219; Committee Report 2 on Carriage of Goods by Sea, Denmark (n 35), 44.
[132] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 34-35;
[133] IMDG Code (amendment 38-16), 5.2.2.
[134] IMDG Code (amendment 38-16), 5.2.2.1.
[135] NOU 1993:36 (n 43), 25.

the dangerous nature of a particular cargo may be complex and a particular mark or label may not reflect all the nuances of its dangerousness.

An interesting question is whether the contracting shipper has fulfilled his obligation to inform where he has made the carrier aware of that the goods are dangerous but not specified the type of danger that they carry with them. The use of the danger class labels, and potentially also merely the provision of the PSN and/or UN Number, could be sufficient to specify the type of danger. The suitability requirement qualifies the contracting shipper's obligation so that any marking of the goods will not necessarily be sufficient. "Suitably" must be interpreted as meaning that the goods shall be marked in a way so that the carrier will appreciate the type of danger inherent in the goods to be able to handle the goods safely. However, the extent of the contracting shipper's obligation to inform must be balanced against the carrier's potential obligations to make his own investigation on the goods. This will be further considered in sub-chapter 4.3.

Pursuant to NMC 13:7 (§ 257), the contracting shipper shall provide the information in *due time*. This requirement is not explicitly repeated in NMC 13:41 (§ 291) and it may be asked whether the information must be given to the carrier in due time for the contracting shipper to escape strict liability. In the light of the wording of NMC 13:41 (§ 291), it may be assumed that the information shall be given at the latest when the goods are handed over to the carrier.[136] Correspondingly, it shall be at this stage that the carrier shall be otherwise aware of the goods. This is a reasonable starting point, as the information will be of no avail to the carrier at a point of time where he can no longer take the required safety precautions. Pursuant to the same reasoning, it would be reasonable to expect that the exclusion of strict liability could also require that information shall be given earlier, where early notification is required to prepare for the necessary safety measures.

4.3.The carrier's lack of knowledge

4.3.1. Introduction

The second precondition for strict liability under NMC 13:41.1 (§ 291.1) is that the receiving carrier must not be *otherwise* aware of the dangerous nature of the goods. The carrier can become otherwise aware by having noticed the dangerous properties of the goods, e.g. that the goods are emitting heat, or having received the information from someone else. Where

[136] NMC 13:41 (§ 291) reads: "Where the contracting shipper *has handed over the dangerous goods*… without informing him". The italicizing is my own.

the receiving carrier has *actual* knowledge of the dangerous nature, the strict liability will doubtlessly not come into play.

However, an interesting question is whether carrier has any obligation to make his own investigations as to the nature of the goods, or whether he is at least expected to possess basic cargo knowledge. This sub-chapter 4.3. will therefore explore whether also the constructive knowledge of the carrier shall be considered when deciding whether the carrier was "otherwise aware" of the dangerous nature of the goods.

4.3.2. The carrier's liability and general duty of care for the goods

The carrier has a general duty of care in respect of the goods he is carrying. Pursuant to HVR article 3(2) the carrier "shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". This duty has not been repeated in the Hamburg Rules or the NMC. However, it must be assumed that the duty is implicitly included in the Hamburg Rules article 5(1) and NMC 13:25 (§ 275), which set out the basis of the carrier's cargo liability. Pursuant to NMC 13:25 (§ 275), the carrier is liable for damage caused during the time he has the goods in his charge, unless he can prove that the damage is not a result of fault or negligence on his side. There is thus a presumed liability, and the carrier must prove that he has been careful and prudent in the handling of the goods. The standard of care will vary depending on the circumstances of the individual carriage and must be assessed on the basis of the contract terms.[137] Where the contract states that a particular cargo is to be carried, the carrier will be expected to possess knowledge of the cargo, or otherwise to acquaint himself with its properties. He shall at least consult a standard cargo handling manual.[138] The carrier thus has a general obligation to make own investigations as to the goods to be carried and their special handling requirements. This general duty is also manifested in the carrier's obligation to examine the package of the goods to a reasonable degree to ensure that they are packed in such a way as not to be apt to cause damage.[139]

The carrier will have a more extensive duty of care where he has taken on to carry goods which are sensitive or otherwise require special care.[140] This is what Brækhus calls the relativity of the carrier's duty of care. However, Brækhus also concludes that the duty of care must as a starting point be decided in the basis of what the carrier *knows or is ought to know*

[137] Falkanger, Bull and Brautaset (n 43), 350.
[138] ibid, 350.
[139] Cf. NMC 13:6 (§ 256).
[140] Brækhus (n 101), 107.

of the particular goods.[141] In order to determine what the carrier knows or is ought to know, a range of factors shall be considered, such as the information provided to the carrier by the contracting shipper, the carrier's previous experience, the nature of the goods etc.[142] The carrier has an extensive obligation to make investigations, but he cannot be expected to find out everything on the properties and requirements of the goods.

As a starting point, the carrier cannot be expected to possess knowledge of special cargo, i.e. of an uncommon nature and with special requirements. This is made clear by both NMC 13:7 (§ 257) on dangerous goods and 13:8 (§ 258) on goods requiring special care. Both provisions require the contracting shipper to notify the carrier of the special nature and necessary handling requirements of the goods. Where the contracting shipper has not notified the carrier pursuant to NMC 13:7 (§ 257) or 13:8 (§ 258), the carrier will consequently assume the goods do not require any special handling.

The liability rule contained in NMC 13:25 (§ 275) is general, applying to the carriage of all kinds of goods. In the carriage of dangerous cargo, the duty of care required by the carrier must thus be decided on the basis of the information he had or ought to have had of the particular goods. Sometimes information on the type of goods will be sufficient to make the carrier aware of their dangerous nature and handling requirements[143], e.g. in respect of typically dangerous goods, such as certain types of explosives. In other cases, the name of the goods may not at all alert the carrier of its dangerous nature. Even though the carrier has a duty to consult general cargo manuals, including the IMDG Code, the carrier must have sufficient information on the goods to be able to check the goods' name and/or properties against the Dangerous Goods List of the code. The PSN, the UN Number and/or a label may provide the proper guidance to ascertain whether the goods are listed as dangerous. Furthermore, in cases where a particular cargo has characteristics that are not typical for that kind of goods, the carrier cannot be expected to possess knowledge of the special handling requirements. Unless the contracting shipper has provided the carrier with specific information on the consignment, the carrier will only be obliged to exercise "normal" duty of care with regards to the ordinary properties of such goods. The case ND 1954.377 Florentine (NCC) provides useful guidelines for the determination of the standard of care in respect of special goods.

[141] ibid, 115.
[142] Falkanger, Bull and Brautaset (n 43), 350 f.; Brækhus (n 101), 115 f.
[143] Falkanger, Bull and Brautaset (n 43), 367.

> In ND 1954.377 the carrier was found free of liability, i.e. because he was not expected to possess knowledge of the treacherous properties of the cargo of copper concentrate and neither obliged to undertake further investigations on the nature of the goods. The master had been aware of previous incidents involving ships carrying copper concentrate along the same route, however, there were no official reports on the fact that the cargo, due to its water content, could liquify during carriage and lead to the listing of the vessel. Only warnings had been issued as to the general dangerous nature of the goods and that bulkheads shall be used in the cargo holds. Bulkheads had been used in the particular case and the master had consulted the shipper as to the proper handling of the goods. The court thus considered that the carrier had fulfilled his duty of care.

To sum up the discussion, it may be concluded that the standard of care required by the carrier when carrying dangerous goods will depend on the knowledge he has or is ought to have on the properties of the particular goods. Where he has no information, and no grounds for suspecting, that the goods require special handling, only ordinary care is required. However, every indication of the goods' special nature will increase the requirements on his own activity.

4.3.3. Is the carrier's constructive knowledge relevant?

Given the relevance of the obligation to make investigations for the purpose of the carrier's liability under NMC 13:25 (§ 275), also in respect of the carriage of dangerous goods, it would be reasonable to assume that the carrier's constructive knowledge, i.e. knowledge that the carrier is ought to have, would be of relevance also for the non-application of the contracting shipper's strict liability. However, the construction of the strict liability rule suggests that only the *actual knowledge* of the carrier is to be considered. The strict liability does not apply where the contracting shipper he has informed the carrier of the dangerous nature of the goods. In that situation, the carrier will possess *actual* knowledge. The second exemption from strict liability is where the carrier "otherwise has knowledge" of the dangerous nature. In my view, "otherwise has knowledge" appears to be referring back to the actual knowledge that the carrier would have had, would the contracting shipper have fulfilled his obligation to inform.

Neither do the NMC nor the preparatory works mention information that the receiving carrier is *ought to have.* The preparatory works consistently refer to knowledge that the carrier otherwise *has.* This shall be compared to the requirements as to the carrier's knowledge in respect of misleading or incorrect information entered on the bill of lading, where it is expressly referred to what the carrier *knew or ought to know*.[144] This would also suggest that actual knowledge is required for the strict liability not to apply. However, it must be pointed out that the Nordic courts are not bound by the exact wording of the codes nor the intention

[144] Cf. NMC 13:49 (§ 297) and 13:50 (§ 298).

of the lawgiver as expressed in the preparatory works.[145] It is therefore relevant to take a look at relevant case law on the topic.

> In the case ND 1954.364 Florø (NCC) two crew members died and the vessel was delayed due to the emission of noxious gases from a cargo of ferro-silicon. The cargo had been standing uncovered on the quay for several days before the loading and become wet. Ferro-silicon is not inherently dangerous but may emit gases when coming in contact with humidity or water. The court established that the particular cargo was dangerous, and that the shipper was strictly liable pursuant to Section 97, second paragraph, of the Norwegian Maritime Code in force at the time.[146] Despite this, the court further considered whether the carrier had been negligent in not making sufficient investigations as to the nature of the goods. The background for this consideration was probably allegations from the contracting shipper that the liability should be divided as the carrier had contributed to the damage by not having made proper investigations despite suspicions as to the dangerousness of the goods. The court however established that it was unnecessary to consider the potential negligence of the carrier, as only the carrier's knowledge of the dangerous nature can exempt the contracting shipper from strict liability.
>
> In ND 1941.353 Else (DCC) the court reasoned that a cargo of steel shavings was dangerous on the basis of a factual assessment of the properties of the goods. It further established that the application of Section 97.2 of the Danish Maritime Code of 1892 required absence of knowledge on the part of the carrier. The carrier asserted that he had not noticed anything special features with the goods during the loading. The loading had been swift, as a grab had been used. The carrier had carried similar goods previously but not experienced any problems with self-heating. The shipper was found strictly liable.

In both cases, the court established that it was unnecessary to consider whether the carrier had been negligent in making own investigations, as only the carrier's knowledge exempts the contracting shipper from strict liability. This indicates that it is only the *actual knowledge* of the carrier that is relevant. If the intention would be to also let constructive knowledge influence on the applicability of the strict liability rule, this would indirectly require the carrier to undertake investigations, at least where there were grounds for suspecting that the goods are dangerous. The case ND 1959.55 Grethe (NCC) may shed some further light on this issue.

> In ND 1959.55 Grethe (NCC) a cargo of hot ore residues had caused damage to the ship. The cargo was considered dangerous for the purpose of Section 92, first paragraph, of the previous Norwegian code on the basis of a factual assessment. The cargo had at the time of loading been very warm and even contained glowing particles. The shipper was found liable under Section 97, however, there was also found considerable negligence on the part of the carrier and the court therefore ordered the shipper to compensate only one third of the carrier's losses.

What is remarkable with the Grethe case is that the court did not expressly consider the issue whether the carrier had been aware of the dangerous nature of the goods. It was only established that the vessel's master had noticed the glowing particles and therefore should have

[145] Jan Hellner, *Rättsteori: En introduktion* (2. uppl, Juristförlaget 1994), 77 f., 99 f.
[146] Section 97:2 of the previous maritime codes read as follows (my own translation): "If the damage is caused by inflammable, explosive or other dangerous goods, which have been loaded without the carrier having knowledge of such characteristics, the shipper is liable, even in the absence of fault or neglect".

taken further measures to investigate the nature of the goods and necessary safety precautions. Furthermore, the court found that there was negligence on both sides and therefore reduced the liability of the shipper. It is not clear from the judgment whether the shipper was found liable under the first or second paragraph of Section 97, i.e. pursuant to the ordinary fault-based liability or the strict liability in respect of dangerous goods, and it is therefore difficult to draw any reliable conclusions.

One interpretation of the judgment may be that the court found that the strict liability under the second paragraph did not apply as the carrier was considered being "aware" of the dangerous nature of the goods, and therefore applied the ordinary liability under Section 97.1. However, this interpretation presupposes that also the constructive knowledge of the carrier is relevant for the strict liability rule. The master had admitted that he had noted glowing particles in the cargo but asserted that he was otherwise unfamiliar with the properties of that kind of goods and therefore, after having consulted the dock personnel, anticipated that the conditions were normal. There was no actual knowledge on the part of the carrier, only suspicions. According to the judgment, this would have required him to take further actions as a prudent shipowner.

However, an alternative, and in my opinion more correct, interpretation of the court ruling is that the court found that the contracting shipper could be held liable under both paragraphs of Section 97, and then proceeded to the conclusion that the liability should be reduced due to negligence on the part of the carrier. The issue of whether the contracting shipper's strict liability may be reduced due to negligence on the part of the carrier requires further analysis and will be considered in Chapter 5. It may however already at this point be admitted that there does not seem to be any obstacle for adjusting the damage payable where there is contributory negligence on the part of the carrier. Tiberg argues along the same lines in his reflections on the Grethe case.[147]

There seems to be a general understand in the Nordic scholarship that NMC 13:41 (§ 291) refers only to the actual knowledge of the carrier[148], and on the basis of the above analysis I find no reasons to challenge the predominant view. However, there are problems inherent in this interpretation. These are mainly connected to the carrier's ordinary duty of care and

[147] Hugo Tiberg, 'Om ansvar för skada på fartyg i kontraktsförhållande' [1962] Handelshögskolan i Göteborg, Skrifter 1962:5, 30.
[148] Honka, 'Introduction' (n 45), 157; Falkanger, Bull and Brautaset (n 43), 368; Tiberg, 'Legal Survey' (n 97), 18.

transport liability and that the contributory negligence will have the same effect as if constructive knowledge would be relevant for the no-application of the strict liability rule. This will be discussed further in sub-chapter 6.5.

4.3.4. Whose knowledge?

As a final remark in respect of the precondition concerning the carrier's unawareness, consideration shall be made to the group of people that the carrier shall be identified with. In a majority of cases the carrier will be a legal entity and not an individual person. In order to establish whether the second precondition for strict liability is met, it is necessary to consider which persons within the sphere of the carrier shall possess the relevant knowledge. Neither the NMC nor the Hamburg Rules provide any guidance. However, HVR article 4(6) provides that a prerequisite for strict liability is that the dangerous goods shall have been shipped without "the carrier, master or agent of the carrier" having consented thereto with knowledge of their nature and character. The strict liability must thus be interpreted so as not to apply where any of these persons had actual knowledge of the goods' dangerous nature. The crucial point must in my view be that the person possessing knowledge must have the authority to initiate the necessary precautionary measures.

5. Final remarks on the allocation of liability

The above conclusion that only the actual knowledge of the carrier will invalidate contracting shipper's strict liability means that no account is taken to whether the carrier had reasons to suspect the cargo was dangerous. The contracting shipper will consequently be strictly liable even where he had no knowledge of the dangerous nature of the cargo whatsoever, but the carrier was in a better position of observing the dangerous nature of the goods. As Mustill J. put it in the *Athanasia Comninos* case, the disregard of the carrier's constructive knowledge will result in a "premium in ignorance".[149] The prevailing interpretation of the strict liability rule confers that the carrier is, at least partly, relieved of his ordinary duty of care in relation to the goods. There appears to exist a clear imbalance between the interests of the contracting shipper and the carrier. Another criticism of the disregard of the carrier's constructive knowledge, is that it will be difficult for the contracting shipper to prove the existence of actual knowledge on the part of the carrier. What furthermore enhances the

[149] *The Athanasia Comninos & Georges Chr. Lemos (The Athanasia Comninos)* [1990] 1 Lloyd's Rep 277, 285.

imbalance of interests, is that the definition of "dangerous goods" is vague and subject to a case-by-case assessment in hindsight, where the damage has already occurred.

It shall be admitted that the consequences of the disregard of the carrier's constructive knowledge for the determination of the contracting shipper's strict liability may be relieved at the stage when the recoverable losses are to be calculated. Both the requirement as to causality between the damaging act and the loss and the possibility of adjusting the damage due to contributory negligence may reduce the contracting shipper's liability where the carrier has been negligent in acquainting himself with the nature of the goods. Where the carrier could have revealed the special nature of the goods by making proper investigations, it should in my opinion be possible to adopt the principle on contributory negligence as expressed in the Finnish Tort Liability Act 6:1 to reasonably allocate the losses between the parties.[150] In the same way as the carrier's liability may be reduced under NMC 13:25.3 (§ 275.3) where some other cause has contributed to the loss, shall it be possible to adjust the contracting carrier's liability. It may be difficult to find a reasonable allocation of the losses given the fact that the negligence of the parties cannot be balanced against each other, as the contracting shipper is liable regardless of fault. This is however not a strong enough reason for excluding the possibility of considering contributory negligence on the part of the suffering party when calculating the compensation.

The Grethe case[151], as referred to in sub-chapter 4.3.3., in my opinion supports the above reasoning. In that case the court ordered the contracting shipper to cover only one third of the carrier's losses as the master had noticed that the cargo contained glowing particles during loading. The cargo was considered dangerous, but it was not elucidated whether the court applied a strict or fault-based liability when holding the contracting shipper liable. If the court considered strict liability to be excluded, that must have been with reference to the carrier's *constructive* knowledge of the goods' dangerous nature. However, in my understanding of the judgment, the court considered the negligence of the carrier for the purpose of the principle of contributory negligence.

Some may argue that the principle of contributory negligence neutralizes the effect of the disregard of the carrier's constructive knowledge and the imbalance of interest. However, in

[150] Finnish Tort Liability Act 31.5.1974/412. Chapter 6, Section 1 reads as follows (unofficial translation from www.finlex.fi): "If there has been a contribution to the injury or damage from the side of the person sustaining it or if a circumstance external to the act giving rise to the injury or damage has been involved, the damages may be adjusted as is reasonable".
[151] ND 1959.55 Grethe (NCC)

my view, there is a crucial difference in considering what the carrier was ought to know already when assessing the applicability of the strict liability rule or only at the stage when the amount of damages is to be calculated. Where the carrier's negligence is of relevance only at the second stage, the contracting shipper has already been found strictly liable and the damages cannot be eliminated in full.

Part II The dangerous goods liability of the contracting shipper – de lege ferenda

6. The appropriateness of the current liability construction

6.1.Introduction

In this chapter the strict liability rule will be scrutinized in more detail, both from a legal-technical and functional point of view. The study has already pointed out several shortcomings in the current strict liability construction. Furthermore, it may be asked whether the current liability scheme confers a proper allocation of risks between the parties and whether it represents the most effective way in minimizing the total costs for damage caused by dangerous goods. Answering the last issue requires considerations from a law and economics point of view.

The chapter will deal with each identified problem of the current strict liability rule separately in sub-chapters 6.2 to 6.6. In sub-chapter 6.7. the appropriateness of placing a strict liability on the contracting shipper will be analyzed from several perspectives, among them general theories on the functions of a strict liability and aspects on channeling and insurance of liability. This critical study of the current liability construction, together with a comparison with the liability model adopted in the RR, will constitute the platform for my proposal for a new, better suited, liability model, which will be presented in Chapter 7.

6.2.The problematic construction in the light of the burden of proof

One main criticism of the current liability construction is the wording of NMC 13:41 (§ 291). The current construction has been justified by reference to e.g. consideration of sub-carrier situations. However, as was concluded in sub-chapter 4.2.3., this argument is flawed. In my view, the current construction is overly complex and makes the rule difficult to apply. One main issue is that the section sets out a strict liability which preconditions are expressed in the negative, i.e. that the strict liability shall apply where the contracting shipper has *not* informed of the dangerous nature and the carrier is *not* otherwise aware of it. The starting point is thus that the contracting shipper is strictly liable only when those two negative

conditions are met. In accordance with ordinary principles on burden of proof, it is the carrier, asserting that the contracting shipper is strictly liable, who shall prove that the goods are dangerous and that he did not possess actual knowledge of the nature of the goods. However, given the fact that the preconditions for strict liability are expressed in the negative, and that it is difficult to present evidence of something that has not happened, the burden of proof will probably quite easily shift to the contracting shipper who then needs to prove the existence of actual knowledge on the carrier's side.

In my opinion, a more appropriate and more easily applicable model would be to set strict liability as the starting point where it has been proven that the goods handed over to the carrier were dangerous. The strict liability would be linked to one or two exceptions, i.e. that a carrier who has taken the goods in his charge with knowledge of their dangerous character cannot invoke the strict liability, and possibly also that the contracting shipper cannot be held strictly liable where he can prove that he has given the required information to the receiving carrier. The adoption of the second exemption is connected to the discussion in sub-chapter 6.3. on the role of the obligation to inform as a precondition for strict liability and the conclusions drawn there. Under the proposed construction of the strict liability rule, the burden of proof would be slightly shifted to the contracting shipper, however, it would make the application of the rule easier.

6.3.The questionable link between the obligation to inform and the strict liability

Subchapter 4.2.3. raised the question whether the contracting shipper's failure to inform as a precondition for strict liability has any independent function. The fulfillment of the obligation to inform will naturally make the receiving carrier aware of the dangerous nature of the goods, and the strict liability rule will consequently be inapplicable. Neither will the strict liability apply where the contracting shipper has failed to inform the receiving carrier, but the latter is otherwise aware of the dangerous nature. The application of the strict liability thus in the end hinges on the receiving carrier's unawareness of the dangerousness of the cargo. In my opinion, the combination of two preconditions for strict liability, which are to a large extent interdependent, makes the application of the rule overly complex, and is not at all necessitated by sub-carrier considerations. A more appropriate solution would therefore be to return to the solution found in the NMC prior to the 1994 revision, i.e. where the prime precondition for strict liability was the carrier's unawareness of the dangerous nature of the goods.

It must however be admitted that there are other interpretations of the current strict liability rule. One of them is provided by Grue. She argues that the contracting shipper could be strictly liable to a later carrier where he has failed to inform the receiving carrier, even though the receiving carrier is otherwise aware of the dangerous nature of the goods. She maintains that the Norwegian maritime law committee report would support this interpretation where the later carrier is not aware of the dangerous nature of the goods.[152] I find her conclusion poorly substantiated and in contradiction with the exact wording of the NMC 13:41.1 (§ 291.1) and the preparatory materials[153]. However, in Grue's reasoning, the non-fulfillment of the obligation to inform as a separate precondition for strict liability would make more sense. Furthermore, in the light of her interpretation, it may also *de lege ferenda* be questioned whether it is reasonable that the contracting shipper may escape strict liability as against later carriers where he has neglected his obligation to inform, but the receiving carrier is otherwise aware of the dangerous nature of the goods. There are several aspects that needs to be considered in this context.

First and foremost, the rationale of the strict liability must be understood as to ensuring that the carrier shall have the required knowledge to carry the goods safely and to decide whether he is at all willing to take on the risk. From that point of view, the contracting shipper's failure to inform will been neutralized where the receiving carrier is "otherwise" aware of the dangerous nature. The receiving carrier can control the risk the goods carry with them further down the transport chain by informing the following carrier. There is an equivalent situation where the contracting shipper has notified the receiving carrier, but where the first carrier has not forwarded this information to the following carrier. The question is whether these two situations should be approached differently. Shall the contracting shipper be held liable for all failures to inform along the transport chain, where he has not given the required information in the first place? Where one of the carriers has been "otherwise" aware of the dangerous nature of the goods, the chain of causation between the contracting shipper's omission and the damage has in fact been broken. In my view, the liability must lie with the carrier who is *otherwise* aware of goods' nature and thus shall ensure that also the following carrier receives the relevant information. This would support the solution proposed above in respect of a strict liability rule based on the receiving carrier's unawareness only.

[152] Grue (n 122), 69-70.
[153] Regeringens proposition till Riksdagen med förslag till sjölag 1994 rd - RP 62/1994 (Finnish Government Bill on a Maritime Code, Finland) (n 7), 50; Regeringens proposition om ny sjölag 1993/94:195 (Government Bill on a New Maritime Code, Sweden) (n 98), 250; NOU 1993:36 (n 43), 43.

However, it must be admitted that there is a flaw in the proposed, and in the current, liability model from the carrier's point of view. A carrier who has suffered a loss due to the previous carrier's failure to provide information on the dangerous nature of the goods will probably have to claim in tort, unless it may be considered existing a contracting shipper-carrier relationship between the two carriers. The liability of the previous carrier will then be fault-based and the suffering carrier will have poorer chances of success. Grue's interpretation and solution would offer a way of channeling the liability to the contracting shipper where he has neglected his obligation to inform in the first place. However, in my opinion, this would not provide any incentives for the carriers further down the transport chain to forward information that he is otherwise aware of, as a later carrier would be more likely to go against the contracting shipper, where fault does not have to be proven. In my view, the problem of channeling the strict liability along the chain of carrier is in the end more dependent on the fact that the dangerous goods liability is placed on the contracting shipper rather than the shipper. This flaw should therefore not be considered an obstacle for abolishing the failure to inform as a separate precondition for strict liability.

6.4.The problem of channeling strict liability along the chain of carriers

As concluded above, under the current construction, the strict liability rule under NMC 13:41 (§ 291) might not be applicable as between two carriers in the transport chain, as the previous carrier is considered a *shipper*[154] of the goods, but not necessarily *a contracting shipper*. The contracting party of the later carrier may be someone else, e.g. a carrier who has taken on the whole transport and then engaged sub-carriers for the performance of all or parts of it. This head carrier will, in his capacity as contracting shipper against his sub-carriers, be obliged to inform only the carrier to whom he physically hands over the goods. The problem is further accentuated by the fact that the head carrier does not necessarily perform any part of the carriage himself. In the chain of carriers, it is thus possible, or even probable, that the strict liability will not be applicable to a shipper-carrier, who failed to forward the information on the dangerous nature of the goods. The claim has then to be made pursuant to ordinary tort rules and fault or negligence must be proven. One may ask whether this is an appropriate solution in a strict liability model. The problem could be overcome by returning to placing the strict liability on the shipper instead of the contracting shipper.[155] The shipper

[154] The shipper is the person who delivers the goods for carriage, cf. NMC 13:1 (§ 251)
[155] In the revisions of the Nordic maritime codes in the 1970's the strict liability was imposed on the contracting shipper (or the charterer, pursuant to the terminology of the time) instead of the shipper, as it was considered

is the person who physically delivers the goods for carriage and would thus include the shipper who delivers the goods to the first carrier and also all carriers in the transport chain. The issue could also be rectified by obliging the contracting shipper to inform the (contracting) carrier of the dangerous nature of the goods. Where a head carrier has engaged sub-carriers to perform the carriage he would then, in his capacity as contracting shipper towards them, be obliged to provide them with the relevant information. I believe the second alternative would be more feasible, as obliging the contracting shipper to inform the contracting carrier instead of, or in addition to, the receiving carrier can hardly have any detrimental effects, whereas changing the liable person may have unexpected consequences.

6.5.The disregard of the carrier's constructive knowledge

In Chapter 5 it was concluded that the current liability construction in Nordic law confers an imbalance of the interests of the contracting shipper and the carrier, as the contracting shipper will be strictly liable even where the carrier could have observed the dangerous nature of the goods by making proper investigations. Given the fact that the carrier must possess actual knowledge for the strict liability rule not to apply, the carrier's ordinary duty of care, including the obligation to investigate the properties and special handling requirements of the goods, does not seem to apply in the carriage of dangerous goods. This is particularly problematic in situations where both the dangerous goods and other property has been damaged. The issues shall be illustrated by way of an example:

> Cargo X is being shipped. The contracting shipper has bought the goods from a manufacturer and according to the delivery terms the buyer shall arrange for the sea carriage. The contracting shipper has no previous experience of cargo X, as it is a fairly new and rare substance. As he is the buyer, he does not physically examine the consignment in question before shipment at the port of loading. The master of the vessel has however carried similar goods previously and has noticed that the cargo is liable to liquify during carriage in certain conditions. He has noted that the water content of the goods will affect its inclination of turning liquid. There are however no officially reported incidents with this kind of goods. Despite having this knowledge, the carrier does not take any measures to investigate the water content of the goods or to construct bulkheads in the cargo holds. During the carriage, the cargo turns liquid during hard, however not extreme, weather and causes the sinking of the vessel. The vessel and all cargo onboard are lost.

This example is to some extent similar to the course of events in ND 1954.377 Florentine (NCC). However, in the Florentine case, the master did not have any personal experience of the carriage of the particular cargo, and he was considered having undertaken sufficient investigations as to the special handling requirements of the goods. In that case the carrier was found free of liability for damage caused to the goods onboard. In the example case, the

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more in line with the wording of the HVR. Cf. Regeringens proposition till Riksdagen med förslag till lag om ändring av sjölagen 116/1974 (Government Bill on the amendment of the Maritime Code, Finland) (n 66), 7.

cargo would probably be considered dangerous pursuant to NMC 13:41 (§ 291), even though it is not yet listed as dangerous in any public safety regulations. The contracting shipper will be strictly liable to the carrier, as the carrier did not have actual knowledge of the dangerous properties of the cargo. It does not matter that the carrier could have found out the cargo's water content and taken safety precautions. However, what is interesting, if the contracting shipper was to direct a claim against the carrier for the loss of his (dangerous) goods, it is likely that the carrier would be considered liable under NMC 13:25 (§ 275) as he did not fulfill his duty of care. The end result must be some sort of allocation of liability between the parties.[156] Under the current liability model, this may be done at the point when the compensable losses are to be calculated. However, as the preconditions for strict liability are met, it is no longer possible for the contracting shipper to fully escape liability. ND 1959.55 Grethe (NCC) also provides an example of the artificial allocation of losses the current strict liability rule forces the Nordic courts into. Due to insufficient motives, it is difficult to draw reliable conclusions as to the court's reasoning in the case, but it must be assumed that court was applying the principle of contributory negligence rather than considering the carrier's constructive knowledge when finding that the contracting shipper was obliged to cover only one third of the carrier's losses. Accordingly, the court found that the preconditions for the contracting shipper's strict liability were met but considered the carrier had contributed to the greater part of the damage by not having carried out proper investigations. I take this judgment as an indication that the court considered the carrier being principally liable for the incident but had no other option than to apply the strict liability rule and try to reduce its unfair risk allocation by reducing the compensable loss by two thirds.

The above examples highlight the complexity in disregarding the carrier's constructive knowledge in the application of the strict liability rule. There is no correlation between the preconditions for liabilities of the contracting shipper and of the carrier when dangerous goods are being carried. An easy way to solve this issue, would be to take the constructive knowledge of the carrier into account already in the assessment of the applicability of the strict liability. This would require an explicit reference in NMC 13:41.1 (§ 291.1) to information the carrier *is ought to have*. The solution would change the end result in situations as the one described in the example case, where the strict liability rule would then not apply. The contracting shipper's liability would then be decided in the basis of the ordinary, fault-based, liability rule contained in NMC 13:40 (§ 290). In the example case, the contracting

[156] Cf. Chapter 5.

shipper must be considered having acted prudently and the carrier would most likely have to carry the losses pursuant to NMC 13:25 (§ 275). I believe this would be a fair solution, given the fact that the carrier had grounds for suspecting the goods could be dangerous. Neither in the situations similar to the Grethe case would the strict liability rule apply, but as there was negligence on both sides there would be a distribution of the losses between the parties along the same lines as under the current liability construction. Support for a strict liability construction which takes account of the carrier's constructive knowledge is also found in the understanding of the HVR article 4(6) under English law. In the *Athanasia Comninos* judgment[157], it was held that the contracting shipper was not strictly liable where the carrier was ought to possess knowledge of the dangerous properties of the goods.[158]

6.6.The vague definition of "dangerous"

It has already been concluded that the NMC contain no definition of "dangerous goods", but that public safety regulations may be consulted to find some guidance. However, in the end a factual assessment of the nature of the particular goods must always be undertaken.[159] In making that assessment, a distinction between "dangerous" goods and other injurious goods must be made. Under Nordic law, "dangerous goods" refers to goods that are primarily inherently and physically dangerous, i.e. which by its inherent characteristics are liable to cause physical damage.[160] Damage cause by other goods, e.g. contraband or goods which are not inherently dangerous, shall be governed by the fault-based rule under NMC 13:40 (§ 290).

The vague definition of "dangerous goods", and the fact that the factual assessment of the dangerous nature of the goods is carried out in hindsight, confers a great unpredictability for the contracting shipper. In my opinion, the proper and fair functioning of the strict liability model would require a factual assessment which is always based on what could have been anticipated as to the good's potential of causing damage *before the carriage.* Some sort of *objective foreseeability* in the "dangerousness" assessment shall be required. The assessment must thus be based on what a prudent contracting shipper was ought to have understood in relation to the nature of the goods at the time of shipment.

[157] *The Athanasia Comninos & Georges Chr. Lemos (The Athanasia Comninos)* [1990] 1 Lloyd's Rep 277.
[158] Cooke (n 129), 1133.
[159] Cf. Chapter 3.4.
[160] Cf. sub-chapters 3.4.2. and 3.4.3.

The current solution must be considered unsatisfactory given the extensive liability that follows where the goods are considered "dangerous". A strict liability placed on the shoulders of the contracting shipper would be easier to accept in case the definition of "dangerous goods" was more predictable. Or the other way around; a vague definition of "dangerous" would be more acceptable where the contracting shipper's liability would be fault-based. However, in the latter case it would no longer be necessary to define "dangerous", as all damage from goods would fit into the ordinary liability rule contained in NMC 13:40 (§ 290). There would be no need to distinguish between dangerous goods and other injurious goods.

If the strict liability model is to be upheld, the assessment of the dangerousness of the goods shall be more predictable. One solution would be to confine "dangerous" to goods that are listed in public safety regulation, primarily the IMDG Code. This would cover most goods that would be considered dangerous under the current rule, however it would not be capable of encompassing new substances or goods that exhibit dangerous properties under special conditions only. However, this could be a fair compromise of the interests of the parties. Where an unlisted substance is shipped, the contracting shipper could still be held liable under NMC 13:40 (§ 290) where he ought to have understood the goods required special handling.

In Nordic doctrine, at least Honka has argued that the strict liability rule shall be extended to cover also non-physically dangerous goods, such as contraband, and semi-dangerous goods.[161] This would bring the Nordic law closer to the English solution, which focus more on dangerous situations rather than "dangerous goods".[162] Given the difficulty of drawing a borderline between dangerous and semi-dangerous goods, I see the benefit of such a reasoning. However, in my opinion, there is a risk that the extension of the scope of the contracting shipper's strict liability to "dangerous situations" would make the strict liability rule even more unpredictable for the contracting shipper.

[161] Honka, 'New Carriage of Goods by Sea - The Nordic Approach' (n 11), 159.
[162] Cf. sub-chapter 3.4.2.

6.7.Shall the contracting shipper's liability be strict?

6.7.1. Introduction

The contracting shipper's strict liability has been justified by reference to that he is in a better position to know the goods he is shipping.[163] In my view, a more nuanced approach is required. I would therefore extract the analysis so far into three distinctive situations which may provide useful insights in respect of the appropriateness of the contracting shipper's strict liability. The situations are the following:

1. Damage is caused by goods, the properties of which the contracting shipper has good chances of knowing or getting acquainted with, e.g. commonly shipped goods and substances listed in public safety regulations.
2. Situations where the carrier is in the same, or better, position as the contracting shipper to know or detect the dangerous properties of the goods, e.g. the example outlined in sub-chapter 6.5. and ND 1959.55 Grethe (NCC).
3. Situations where neither the carrier nor the contracting shipper knew, or could have known, the dangerous properties of the goods.

In the first situation, a strict liability imposed on the contracting shipper appears rather uncontroversial. In the second situation, a strict liability rule could also be accepted, provided it takes the constructive knowledge of the carrier into account. The last situation is however not as clear-cut and, in my opinion, it brings the question of the appropriate basis of liability to a head. This sub-chapter 6.7. will be focusing on this kind of situation, when bringing aspects such as general theories on strict liability, channeling and limitation of liability and availability of insurance cover into the picture. Furthermore, consideration will be made to the RR and their drafting process, which is the most recent attempt to regulate the dangerous goods liability within carriage of goods by sea.

6.7.2. The preventive function of a strict liability in general

In the Nordic countries, strict liability has developed both through legislation and legal principles that have been formulated by case law.[164] Strict liability has been imposed in respect of e.g. compensation of environmental damage, liability for oil pollution from ships and product liability. What is common for most activities covered by a strict liability is that they are in some sense considered exceptional, either because they are particularly dangerous or

[163] Cf. discussion in sub-chapter 2.1.4.
[164] Pauli Ståhlberg and Juha Karhu, *Finsk skadeståndsrätt* (Fiducia vol 2, Talentum 2014), 138.

because they may lead to extensive damage.[165] A strict liability may be justified where a fault-based liability, despite the relativity of the standard of care, might not be sufficient to control the risks where an activity is dangerous enough.[166]

From a legal policy point of view, a strict liability may be justified where the injurer seeks economic gains in carrying out the dangerous activity[167] and the victim has poor chances of avoiding the damage.[168] It seems reasonable that the party carrying out a dangerous activity shall bear the consequences when the risk materializes. The prevailing *polluter pays principle* within environmental law provides an example of this kind of reasoning. The principle has been used to justify strict liability for e.g. maritime pollution liability, primarily through arguments on economic prevention.[169]

However, the justification for imposing a strict liability is more often based on a *law and economics* arguments, and primarily on arguments on *economic prevention*[170]. Law and economics is a behavioral science which is aimed at understanding how distinct legal interpretations or regulations may influence the behavior of individuals.[171] Within the field of tort law, the theory on economic prevention is aimed at minimizing the total costs by means of tort rules and insurance arrangements.[172] When calculating the total costs both the *primary costs*, inter alia costs for the expected damages and prevention costs, and *secondary costs*, such as transaction costs, shall be considered.[173]

The primary costs may, simply put, be reduced either by *increasing the standard of care* required or by *reducing the level of activity*.[174] There is a close connection between the basis of liability and the amounts of primary costs. As the prevention costs will generally increase where the required standard of care becomes more stringent, the optimal level of care must be found. A system where the prevention costs exceed the expected damage will not be efficient. It must also be considered who is the "cheapest cost avoider" when risk is

[165] ibid, 139.
[166] Jan Hellner and Marcus Radetzki, *Skadeståndsrätt* (Nionde upplagan, Norstedts Juridik 2014), 163.
[167] Ståhlberg and Karhu (n 165), 139.
[168] Hellner and Radetzki (n 167), 163.
[169] Björn Sandvik, *Miljöskadeansvar: En skadeståndsrättslig studie med särskild hänsyn till ansvarsmotiv, miljöskadebegreppet och ersättning för skada på miljön* (Åbo akademi 2002), 17.
[170] ibid, 59.
[171] Kalle Määttä, *Oikeustaloustieteen aakkoset* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisut [1], Helsingin yliopisto 1999), 12.
[172] Björn Sandvik, 'Skadeståndsinstitutets preventiva betydelse: Särskilt om strikt ansvar och ekonomisk prevention' (1999) 86 Retfærd 22, 25.
[173] ibid, 25.
[174] Sandvik, *Miljöskadeansvar* (n 170), 44.

allocated.[175] When allocating the risks between the injurer and victim consideration shall be made to which party can insure his risks to the lowest costs.[176]

It is often maintained that an optimal level of care on both the injurer's and the victim's side may be attained by a fault-based as well as a strict liability, when combined with the principle on contributory negligence.[177] However, there is a great difference in that strict liability will charge the costs of *accidents* on the injurers, whereas under negligence they are born by the victims.[178] The strict liability may however provide an additional cost-controlling instrument in comparison to the fault-based liability, namely to influence the level of activity. Where a party risks facing a strict liability, he may have incentives to reduce the extent of his business. However, a strict liability will be most beneficial in situations where the injurer has better opportunities than the victim of affecting the probability and extent of damage.[179] Where a victim may to a larger extent contribute to the damage, a strict liability will not be economically effective.[180]

Applying the above law and economics theories on the issue of strict liability for damage caused by dangerous good in carriage of goods by sea, it may be established that a certain degree of care is required by both the contracting shipper and the carrier for the goods to be transported safely. The contracting shipper's care is primarily linked to his obligation to provide information on the properties of the goods, but also to pack and mark the goods properly. The carrier, on the other hand, must exercise due care in the handling of the goods, and in acquainting himself with their special requirements. It is admitted that the contracting shipper is generally in a better position to know the special features of the specific cargo, but that is not always the case.

In cases where the dangerous characteristics of the goods are more foreseeable for the contracting shipper, cf. the first situation as outlined in 6.7.1., a strict liability may be justified on the basis of the above theories, at least where the carrier has no actual or constructive knowledge of the dangerous nature of the goods. In that kind of situation, the carrier will have poor chances of avoiding the damage in spite of taking due care, whereas the

[175] Hellner and Radetzki (n 167), 53.
[176] ibid, 53.
[177] Sandvik, *Miljöskadeansvar* (n 170), 45, referring to Steven Shavell, *Economic analysis of accident law* (Harvard University Press 1987), 16.
[178] Frank H Stephen, *The economics of the law* (First publ. 1988, repr, Harvester Wheatsheaf 1989), 137.
[179] Shavell (n 178), 29.
[180] Määttä (n 172), 70-71.

contracting shipper may more easily prevent damage from occurring. The contracting shipper may also control his risk by reducing the trading with those dangerous substances.

However, there are instances where the carried goods possess properties that neither the contracting shipper nor the carrier could possibly be aware of, cf. situation 3 above. In such cases, a strict liability would hardly have any preventive function compared to a fault-based liability. Neither will the strict liability provide any incentives to reduce or stop the shipments of such goods, as their dangerous nature is not known. From a legal policy point of view, it is not reasonable to impose a strict liability where the liable person has little chances of appreciating the dangerous nature of his acts.[181] A damage caused by goods, which dangerous characteristics are unknown to the contracting parties, must practically be considered an accident. It must thus be decided whether it is more equitable to place the risk for such an accident on the contracting shipper (by way of a strict liability rule) or on the carrier (fault-based liability on side of the contracting shipper). Drawing any conclusions in respect of this requires further considerations on the general functions of a strict liability.

The *secondary costs* will also have an impact on the efficiency of tort rules. The costs of risk-bearing are secondary costs which play an important role in this context: a person's ability to carry risks depends to a large extent on his access to insurance.[182] It will be of relevance who can insure at the lowest cost.[183] The carrier's and contracting shipper's access to insurance for damage caused by dangerous goods will be further dealt with in sub-chapter 6.7.3. Furthermore, there are transactional costs to consider.[184] Costs for proving the existence of negligence may advocate for imposing a strict liability.[185] However, it shall not be disregarded that also strict liability requires demonstration of causality.[186]

Another important aspect is that strict liability will allocate the economic resources in the most efficient way where the damage is "perfectly compensatory", meaning that the victim's

[181] Juha Häyhä, 'Ankara vastuu ja vahingonkorvausoikeiden järjestelmä' (1999) XXXII Oikeustiede-Jurisprudentia 81, 113, 123; Henry B Ussing, 'Skyld og skade: Bør erstatningspligt udenfor kontraktsforhold være betinget af culpa?' (Dissertation, University of Copenhagen 1914), 149-152.
[182] Henrik Lando, 'Tort Law from the Perspective of Economic Theory' (1997) 110 TfR 919, 923.
[183] ibid, 930.
[184] According to Hellner and Radetzki (n 167), 52, a result of the so-called Coase theorem the transactional costs will play an prominent role for the efficiency of the chosen tort rules. Pursuant to the Coase theorem, however, the tort rules would have no influence on the allocation of economic resources, if there would be no transactional costs at all.
[185] Määttä (n 172), 71.
[186] Lando (n 183), 931.

losses shall be compensated in full.[187] Where the injurer is not liable for all damage caused, he will not be encouraged to avoid the part of the loss that is not compensable. In the context of carriage of dangerous goods by sea, the contracting shipper will have a right of global limitation of his liability.[188] It is admitted that the limitation amounts are normally extensive and may not affect the exercised level of care appreciably. This fact is still one of many factors that must be considered in the complex issue of determining the most appropriate basis of liability for damage caused by dangerous goods.

To summarize the above outline of theories of economic prevention, there are a range of aspects that must be balanced against each other to derive at some sort of conclusion. There appears to be several arguments in favor of applying a fault-based liability for damage caused by dangerous goods where the dangerous nature is difficult to predict. However, as Lando duly points out, in deciding whether a strict liability is justified, the possibility of using other instruments in combination with tort law in order to reduce the total costs must be taken into account.[189] Public safety regulations may also ensure sufficient prevention[190], as the breach of these may lead to hefty fines and other penalties. The threat of sanctions may provide an important incentive for the contracting shipper to exercise a high level of care. Before any further conclusions as to the appropriateness of the strict liability will be drawn, considerations will be made to the availability of insurance and channeling of liability.

6.7.3. Insurance aspects

According to Hellner and Radetzki, the availability of a liability insurance may be a legal policy argument in favor of imposing liability on a party.[191] By the same token, the lack of liability insurance solutions on the market may advocate for a fault-based liability, rather than a strict one. In choosing between the two alternatives, considerations shall also be made as to who is the "cheapest insurer", i.e. who can obtain insurance at the lowest cost.[192]

The contracting shipper may, depending on the delivery terms of the sales contract, be obliged to insure the cargo during carriage. This kind of cargo insurance however only covers damage *to the goods* and not the contracting shipper's liability for damage caused by

[187] Häyhä (n 182), 135, citing Robert Cooter and Thomas S Ulen, *Law and economics* (The Addison-Wesley series in economics, 3. ed. Addison-Wesley 2000), 362-363. See also Määttä (n 172), 70.
[188] Cf. sub-chapter 2.1.2.
[189] Lando (n 183), 928.
[190] ibid, 931.
[191] Hellner and Radetzki (n 167). 175.
[192] Cf. sub-chapter 6.7.2.

the goods. To my knowledge, there is no ready insurance solution on the market which is tailored for the contracting shipper's dangerous goods liability. The contracting shipper may however choose to take out a *general liability insurance*, which covers liability for personal injury and property damage caused in his business. As the name suggests, this is however a general insurance, which is not necessarily adapted for the special circumstances of carriage of goods by sea. The terms and conditions of the insurance may be subject to exclusions and limitations, which may affect the contracting shipper's rights of compensation for liability for third-party damage caused by his goods. The insurance generally excludes liability for environmental damage, which means that a separate insurance cover must be arranged for that.[193] Furthermore, the standard insured amount will most likely be insufficient to cover the extensive losses dangerous goods may cause in a worst-case scenario. Even though the insured amount is subject to agreement between the parties to the insurance contract, it will not be economically feasible to increase the insured amount solely for the purpose of such worst-case scenarios. The insurance cover is also as a starting point restricted to liability that may arise under general tort rules and contractual liability must be specifically included pursuant to an additional premium.[194] This will be the case with the contracting shipper's liability to the carrier under NMC 13:41 (§ 291), as it is considered contractual.[195]

The carrier however has better opportunities of insuring his risks for damage caused by dangerous goods. In the carriage of dangerous goods, the carrier's risks will be in the form of property damage (to his ship and other property onboard) and liability (for damage and injuries caused to third parties). He may cover all of these risks by way of a hull and machinery (H&M) and a protection and indemnity (P&I) insurance. The P&I insurances are mainly provided by so-called P&I clubs, which are mutual insurance companies. These are founded on the idea that insurance shall be offered at cost price. H&M insurance is also to some extent provided by mutual companies. However, given the number of insurance providers on the market, the insurance premiums for full-scale H&M insurances are generally reasonable.

In the light of the foregoing, the appropriateness of placing of a strict liability on the contracting shipper may be further questioned. The allocation of risks between the parties seems unreasonable given the fact that there is no truly adequate insurance policy covering the

[193] If Terms & Conditions for general liability insurance, 5.2.13.
[194] If Terms & Conditions for general liability insurance, 5.2.5.
[195] Cf. sub-chapter 2.1.2.

contracting shipper's liability, whereas the carrier is offered well-adapted solutions to a reasonable cost. This finding is not at all new: already in a discussion on liability for damage from goods in 1978 it was concluded that the insurance practices were not sufficiently developed in comparison to the extensive risks the contracting shipper is carrying.[196] After 40 years, it must be assumed that there is no commercial interest in offering a separate liability insurance product covering the contracting shipper's liability for damage caused by (dangerous) goods. It is therefore time to consider other instruments for obtaining a more equitable risk allocation between the contracting shipper and carrier.

6.7.4. Aspects on channeling of liability

Expanding the perspectives of this study, possibly somewhat outside of the intended scope of the thesis, considerations will also be made as to channeling of strict liability.[197] These considerations may help understanding the position of the contracting shipper within a field of law that is characterized by multiple liability systems. Liability for damage caused by (dangerous) goods is not governed by a single uniform liability regime which channels liability to a particular person. There are several parallel liability systems, such as the NMC's provisions on the contracting shipper's strict liability, the CLC and the HNSC. In addition to these, claims may be made pursuant to ordinary tort rules. The liable persons and basis of liability are different under these separate regimes. To draw conclusions as to the appropriateness of the contracting shipper's strict liability under NMC 13:41 (§ 291), it must be considered whether the construction of the rule may have implications on the channeling of liability in general.

Under the CLC and HNSC liability is channeled to the registered owner of a ship by placing a strict liability on his shoulders. The CLC covers liability for *pollution damage* caused by the escape or discharge of oil carried as cargo on the ship.[198] Under the HNSC the registered owner is strictly liable for *personal injury, damage to property outside the ship and*

[196] Kurt Grönfors, 'Summarizing a Multi-Dimensional Problem' in Kurt Grönfors (ed), *Damage from Goods* (Skrifter/ Sjörättsföreningen i Göteborg vol 58. Akademiförlaget 1978), 113.
[197] In Ulf K Nordenson, 'Channelling the Liability' in Kurt Grönfors (ed), *Damage from Goods* (Skrifter/ Sjörättsföreningen i Göteborg vol 58. Akademiförlaget 1978), Nordenson leads an interesting discussion on the viability of channeling of liability for damage caused by goods.
[198] Article III of the CLC.

environmental pollution caused by hazardous and noxious cargo.[199] The strict liability under these conventions is founded on the *polluter pays* principle.[200]

The strict liability rule in NMC 13:41 (§ 291) is not restricted to certain kinds of losses, however, it only applies to the relationship between the contracting shipper and the carrier. Third-parties will thus have to claim the contracting shipper pursuant to ordinary tort rules. On the other hand, the carrier has a right of recourse against the contracting shipper under NMC 13:41 (§ 291) for damage which he has compensated to third-parties. It shall however be pointed out that, under HNSC, third-parties suffering damage from hazardous and noxious goods will have to resort to claiming the contracting shipper in tort, where the contracting shipper has failed to inform the carrier of the goods' dangerous nature and the carrier did not otherwise know or ought not to know of the nature, as the registered shipowner is then exempted from strict liability.[201]

There is no full synchronization between the separate liability regimes covering damage caused by dangerous goods. The above example shows that a third-party suffering damage from hazardous or noxious substances will not be able to invoke strict liability against the carrier/registered owner nor the contracting shipper where the contracting shipper has failed to fulfill his obligation to inform. This is not an optimal solution if liability is supposed to be channeled to the ultimately liable person. I admit that the strict liability rule in NMC 13:41 (§ 291) is older than the liability regimes of mentioned international conventions, but if the idea of channeling liability is to function properly, the separate liability schemes must be connected. If the intention would have been that the strict liability for hazardous and noxious cargo was to be channeled, by way of recourse actions, to the contracting shipper, the particular exemption in HNSC would not have been added. However, I do not think it would be an optimal solution either to expand the scope of the contracting shipper's strict liability under NMC 13:41(§ 291) to cover also damage caused to third-parties. In my opinion, an option could be to include the contracting shipper/shipper/cargo owner within the group of liable persons under CLC and HNSC, and then let NMC 13:41 (§ 291) govern the reciprocal allocation of liability between the carrier and the contracting shipper. However, the amendment of international conventions is a complex process and is probably not a viable option in the light of their already advanced compensation and funding structures. The

[199] HNSC, Article 7.
[200] Sandvik, *Miljöskadeansvar* (n 170), 17; Peter Wetterstein, *Redarens miljöskadeansvar* (Åbo Akademis förlag 2004), 106-107.
[201] Cf. HNSC Article 7.2(d).

conclusion must be that the appropriate liability basis under NMC 13:41 (§ 291) is an independent issue which must be decided without considerations to the channeling of liability.

6.7.5. The appropriateness of a strict liability in the light of the Rotterdam Rules

Under Nordic law, the contracting shipper's liability for damage caused by his dangerous goods has practically been the same since the strict liability was introduced in the revision of the Nordic maritime codes in the 1930's. The liability rule has been subject to scrutiny and minor revisions during the 20th century, but no genuine attempts have been made to abolish the strict basis of liability in the NMC. However, the drafting process of the RR, being the most recent international attempt to review the basis of liability, may provide interesting input to the discussion. The RR have not yet entered into force and are unlikely to do so within a foreseeable future[202]. The fact that the first drafts to the convention did not contain any special liability regime in respect of dangerous goods, and that a strict liability rule was reintroduced later in the drafting process, however may shed some light on the appropriateness of the strict liability in modern times.

The RR were adopted by the UN General Assembly in Rotterdam in December 2008, however the work within UN Commission on International Trade Law (UNCITRAL) with preparing the convention started already at the beginning of the new millennium.[203] The aim of the convention is to modernize and harmonize international rules relating to maritime carriage of goods by replacing the HR, HVR and Hamburg Rules.[204] The contracting shipper's[205] dangerous goods liability is set out in article 32, which provides that he shall be strictly liable for damage caused by his failure to inform the carrier[206] of the dangerous nature of the goods or to mark the goods. The strict liability will however not apply in cases where the carrier or performing party[207] was otherwise aware of the dangerous nature. It shall be noted that, pursuant to article 32, it is sufficient that the information is given to the carrier,

[202] By October 2019 only four states have ratified the convention, whereas 20 ratifications are needed for it to enter into force. Cf. UNCITRAL, 'Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)' <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> accessed 5 October 2019.
[203] Francesco Berlingieri, 'The History of the Rotterdam Rules' in Meltem D Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: an "Appraisal of the Rotterdam Rules"*
[204] Van Steenderen MainportLawyers, 'Rotterdam Rules: Introduction' <https://www.rotterdamrules.com/content/introduction> accessed 13 October 2019
[205] The Rotterdam Rules however use the term "shipper". Pursuant to Article 1, the shipper is the person who enters into a contract of carriage with a carrier.
[206] Rotterdam Rules Article 1 defines the carrier as the person entering into a contract of carriage with a shipper.
[207] In article 1 "the performing party" is defined as a person that performs any of the carrier's obligations under a contract of carriage, such as loading, handling, stowage and carriage. It can thus be e.g. a sub-carrier.

even where the goods are delivered to a performing party. Goods are considered dangerous where they, by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment.[208] The phrase "reasonably appear likely to become" was added to include goods that was not dangerous at the time of shipment, but could turn dangerous during the voyage.[209] The chosen wording however shows that considerations were given to the contracting shipper's chances of predicting the goods' potential of becoming dangerous at the time of shipment. Despite the attempt to define "dangerous", it is not fully clear how this shall be interpreted. Stevens and Baughen conclude that it probably includes legally dangerous goods, such as contraband.[210] This implies a difference in comparison to the scope of the strict liability rule under the NMC. However, to other parts, the RR do not bring about any material changes with regards to the contracting shipper's strict liability.[211]

The CMI Draft Instrument on Transport Law[212] (Draft Instrument), which was an early draft to the RR, did not contain any special liability regime in respect of dangerous goods.[213] However, a separate provision on dangerous goods was later reintroduced in the draft convention.[214] Pursuant to article 7.6. of the Draft Instrument the contracting shipper's liability to the carrier was based on fault with a reversed burden of proof. In the comments to article 7.6 CMI justified the proposal by holding that the distinction between dangerous and ordinary goods was out of date and caused interpretational issues given the relativity of the notion "dangerous".[215] The UNCITRAL Working Group on Transport Law (Working Group III) took over the drafting work from the CMI in 2001, and during their 13th session in 2004

[208] Rotterdam Rules Article 32.
[209] UNCITRAL Working Group on Transport Law, 13th session, 'A/CN.9/552' (May 2004), Article 148; UNCITRAL Working Group on Transport Law, 16th session, 'A/CN.9/591' (December 2005), Article 159; UNCITRAL Working Group on Transport Law, 19th session, 'A/CN.9/621' (April 2007), Article 250.
[210] Frank Stevens, 'Duties of the Shipper and Dangerous Cargoes' in Thomas D Rhidian (ed), *The carriage of goods by sea under the Rotterdam rules* (Informa Law 2010), 230-231; Simon Baughen, 'Obligations owed by the shipper to the carrier' in Thomas D Rhidian (ed), *A new convention for the international carriage of goods by sea - the Rotterdam Rules: An analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009), 183.
[211] Tomotaka Fujita, 'Obligations and Liabilities of the Shipper' in Meltem D Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: an "Appraisal of the Rotterdam Rules"* , 211-212, 227-228.
[212] CMI Yearbook 2001, 'CMI Draft Instrument on Transport Law' (2001). UNCITRAL delegated the initial preparatory work to the Comité Maritime International (CMI), which delivered their Draft Instrument in 2001. Cf. Thomas Rhidian, 'The Emergence and Application of the Rotterdam Rules' in Thomas D Rhidian (ed), *The carriage of goods by sea under the Rotterdam rules* (Informa Law 2010), 1.
[213] Stevens (n 211), 229.
[214] ibid, 229-230.
[215] CMI Yearbook 2001 (n 213), 565.

it was proposed to introduce a special liability rule regarding dangerous goods. In report A/CN.9/552 of Working Group III the following was expressed:

> "As to the substance of the proposal under which the shipper should be held strictly liable to inform the carrier of the dangerous nature of the goods and of the necessary safety measures, a concern was expressed that the proposed rule might be unnecessary and its effect uncertain, unpredictable, and overly onerous for the shipper, particularly in view of existing case law in a number of countries, under which goods, although not identifiable as dangerous before the carriage could later be declared dangerous by courts adjudicating the claim, for the sole reason that they had caused damage."[216]

It was further concluded that, should a provision referring to "dangerous goods" be included, a definition should be provided.[217] The draft presented at the 16th session included a general definition of dangerous along the same lines as in the final RR.[218] During the session, it was proposed that the definition should be tied to existing international instruments on dangerous goods, such as the IMDG Code and HNSC, but this was dismissed with reference to that these were created for public interest purposes and were very technical in nature.[219] What is remarkable is that the contracting shipper's obligation to mark or label the goods in RR article 32(b) shall be determined by "any law, regulation or other requirement of public authorities".

In the early process of drafting the RR, the special rule on strict liability for dangerous goods was thus considered, and found redundant, by the CMI. Working Group III surprisingly easily concluded that the dangerous goods liability construction of the HVR and the Hamburg Rules should be maintained. To me it appears like Working Group III was not ready to let go of the old and tested concepts of the HVR and Hamburg Rules, even though concerns had been raised as to their unpredictability and onerousness from the contracting shipper's point of view. The proposal to bind the notion of "dangerous goods" to the IMDG Code or the HNSC was also dismissed without any profound considerations. Working Group III opted for the traditional and tried approach, but I am not fully convinced this is for the best. However, from a Nordic point of view, the RR bring about interesting modifications as to whom the information shall be given to (i.e. the contracting carrier) and emphasis on the contracting shipper's possibilities of predicting the goods' potential of becoming dangerous during carriage.

[216] UNCITRAL Working Group on Transport Law, 13th session (n 210), paragraph 146.
[217] ibid, paragraph 147.
[218] UNCITRAL Working Group on Transport Law, 'A/CN.9/WG.III/WP.56' (September 2005), Article 33.
[219] UNCITRAL Working Group on Transport Law, 16th session (n 210), paragraph 158.

7. A new liability model

In Chapter 6 the appropriateness of the current liability construction in NMC 13:41 (§ 291) was analyzed from several perspectives. The criticism of the liability construction may be divided into two groups: one accepting strict liability as the proper basis of liability, and one that goes to the roots of the current construction in questioning whether a strict liability is at all justified. The question under the latter category may be rephrased in the following way: shall there be a special liability regime for dangerous goods?

The function of the current model, where the contracting shipper's liability for damage caused by dangerous goods is strict, could in my opinion be improved by several modifications. Firstly, the liability rule must be redrafted with regards to its functionality and allocation of the burden of proof. It is not ideal to express the preconditions for strict liability in the negative. Therefore, the strict liability shall apply where it is proven, by the carrier, that the shipped goods were *dangerous*, but shall be subject to two exceptions, which the contracting shipper may invoke and prove the fulfilment of.[220]

The first exception is where the claiming carrier was aware, or was ought to be aware, of the dangerous nature of the goods. This means that none of the carriers involved in the carriage of the goods can invoke the contracting shipper's strict liability where he took the goods in his charge with knowledge of their dangerous nature.

Pursuant to the second exception, strict liability shall also be excluded where the contracting shipper can prove that contracting carrier was aware, or ought to be aware, of the dangerous nature of the goods. This practically means that the contracting shipper shall inform the contracting carrier rather than the receiving carrier. In my view, it is more natural that the contracting shipper shall inform his contracting party. Furthermore, as the contracting shipper is not necessarily the shipper of the goods, he and the receiving carrier, who may be a sub-carrier, may not always have appropriate means of communicating with each other. This modification of the obligation to inform is however primarily aimed at ensuring that the information on the dangerous nature of the goods is more likely to flow along the whole chain of carriers, as the contracting carrier will be obliged to inform his sub-carriers.[221] The contracting carrier will be considered a contracting shipper in relation to his sub-carriers and

[220] Cf. sub-chapter 6.2.
[221] Cf. discussion in sub-chapter 6.4.

will therefore be strictly liable towards them. Sub-carrier situations[222] and the channeling of the strict liability along the chain of carriers[223] are thus taken into consideration. In improving the flow of information, there are tremendous gains to be made in the prevention of damage caused by dangerous goods.[224] Dangerous situations are after all often caused by the lack of information on the special handling requirements of the goods.[225] In this solution, there would be no separate precondition regarding the contracting shipper's failure to inform; under the second exception no regard is paid to how the carrier has become aware of the dangerous nature.[226] Furthermore, the *constructive* knowledge of the carrier shall also trigger the exceptions.[227] This will ensure a more equitable distribution of liability between the contracting shipper and the carrier, as the carrier will have to fulfill his ordinary duty of care also when he is carrying dangerous goods.

It was established previously that information on the necessary safety measures does not have any independent function for the purpose of the strict liability rule.[228] Consequently no reference is made to that part of the obligation to inform in the proposed modified strict liability rule. However, where the failure to inform of necessary safety measures has resulted in losses, liability may ensue under the ordinary fault-based liability rule in the current NMC 13:40 (§ 290).

With regard to the definition of dangerous goods I have asserted that, in a strict liability model, the determination of whether a particular cargo is dangerous or not must be more predictable for the contracting shipper.[229] The current construction does not expressly state that the dangerousness assessment shall be based on what was known at the time of shipment, and there is thus a risk that the courts will be more inclined to will consider the goods being dangerous where a severe incident has in fact occurred. From the contracting shipper's point of view this is not reasonable. A very detailed definition however risks becoming too rigid and turn obsolete considering the constant emergence of new substances and to some physically semi-dangerous goods. The separate interests and aspects must thus be balanced

[222] Consideration of sub-carrier has been used as an argument for justifying the independent function of the contracting shipper's failure to inform as a separate precondition for strict liability. Cf. sub-chapters 4.2.3. and 6.3.
[223] Cf. Discussion on channeling of liability in sub-chapter 6.3 and 6.4.
[224] Grönfors, 'Summarizing a Multi-Dimensional Problem' (n 197), 107-108.
[225] Mustill (n 4), 72, 76-77.
[226] Cf. discussion in sub-chapter 6.3.
[227] Cf. sub-chapter 6.5.
[228] Cf. sub-chapter 4.2.4.
[229] Cf. sub-chapter 6.6.

against each other. From the contracting shipper's perspective, a definition referring to the existing international instruments on dangerous goods, such as the IMDG Code and the HNSC, would provide the best predictability. However, this definition would be fully dependent on the frequent revisions of these instrument. I would therefore rather propose a definition founded on an objective foreseeability assessment[230] as the one contained in RR article 32. Pursuant to the Rotterdam definition, it is evident that the assessment shall be based on what was known on the nature of the goods, and their potential of becoming dangerous, at the time of shipment. The phrase "reasonably appear likely to become" implies that the assessment shall be made from the perspective of a prudent contracting shipper, rather than on the basis of subjective circumstances on the side of the contracting shipper. I see no reasons for restricting the definition of dangerous to physically dangerous goods, but it could also comprise semi-dangerous and legally dangerous goods, such as contraband, as long as the dangerousness could have been anticipated at the time of shipment. By including contraband and goods that may turn dangerous under special circumstances within the scope of the strict liability rule, the issues with distinguishing between the categories of dangerous goods will be eliminated.[231]

The liability model proposed above builds on the presumption that the contracting shipper's liability for dangerous goods shall remain strict. However, the outline in sub-chapter 6.7. shows that there are grounds for questioning the strict basis of liability, especially from an economic prevention and insurance point of view. A strict liability may serve the purpose of providing the contracting shipper with additional incentives to enhance his level of care, inter alia in making himself acquainted with the goods he is shipping, and possibly also to consider whether to at all trade with dangerous goods. However, the strict liability will not have these functions where the contracting shipper has little chances of appreciating the dangerous nature of the goods. I do however believe that the proposed modifications to the current liability rule would shift many of these unpredictable situations from the scope of the strict liability rule to the fault-based liability rule under NMC 13:40 (§ 290). There are thus justifications for maintaining the strict basis of liability, where the scope of the strict liability rule is adjusted in the ways suggested above. The contracting shipper's difficulties in obtaining insurance for his dangerous goods liability remain, but the consequences would be relieved by the fact that he would have better opportunities of controlling the risks and

[230] Cf. sub-chapter 6.6.
[231] Cf. discussion in sub-chapter 3.4.2.

preventing liability from arising. This might also make the contracting shipper's strict liability for dangerous goods more commercially attractive to insure.

8. Conclusions

In this thesis, the strict liability of the contracting shipper under the NMC has been analyzed from both a *de lege lata* and *de lege ferenda* point of view. It has been concluded that the current model is not fully satisfactory as it confers an imbalance between the interests of the contracting shipper and the carrier. It is therefore time to review the special liability regime in respect of dangerous goods. The thesis has however concluded that there are still arguments in favor of maintaining the strict basis of liability, however the rule must take predictability considerations into account when defining "dangerous goods" and ensure that a sufficient level of care is required by the carrier also when dangerous goods are being carried. The definition of dangerous goods need no to be tied to the dangerous goods lists included in public safety regulation, such as the IMDG Code, however, there is a need to ensure that the dangerousness assessment performed by the courts in hindsight, where a damage has already occurred, will be based on what was known of the goods at the time of shipment. The perspective shall be that of a prudent contracting shipper. In my view, a dangerous goods definition being founded on an objective foreseeability from the contracting shipper's point of view is crucial for balancing the interests of the parties to the contract of carriage. Furthermore, the strict liability rule shall take the constructive knowledge of the carrier into account, meaning that the contracting shipper will never be strictly liable where it is proven that the contracting carrier, or a claiming sub-carrier, was, or ought to be, aware of the dangerous nature of the goods. This means that the carriers must be active in investigating the nature of the goods to be carried. Where the contracting carrier possess constructive knowledge of the dangerous nature of the goods, the strict liability will be excluded also towards later sub-carriers, irrespective of whether they were unaware of the dangerous nature.

In chapter 7 a new liability model embracing the above aspects was presented. The proposed liability model is aimed at ensuring a proper flow of information along the chain of carriers, as information is the key to prevent damage caused by dangerous goods.

Abbreviations

Legislative acts and conventions

BC	International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
CLC	International Convention on Civil Liability for Oil Pollution Damage 1992
DGA	Act on Transport of Dangerous Goods 719/1994 (Finland)
DGD	Decree on the Transport of Dangerous Goods in Packaged Form by Sea (Finland)
DMC	Merchant Shipping Act (Act no. 170 of 1995) (Denmark)
Finnish Bill	Finnish Government Bill on a Maritime Code (Regeringens proposition till riksdagen med förslag till sjölag 1994 rd – RP 62/1994)
FMC	Maritime Code 674/1994 (Finland)
HNSC	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996
HR	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (Hague Rules)
HVR	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as Amended by the Protocol signed at Brussels on 23 February 1968 and the Protocol signed at Brussels on 21 December 1979 (Hague-Visby Rules)
IBC Code	International Bulk Chemical Code
IGC Code	International Gas Carrier Code (IGC Code)
INF Code	International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships
IMDG Code	International Maritime Dangerous Goods Code 38-16
MARPOL	International Convention for the Prevention of Pollution from Ships
NMC	Nordic Maritime Codes of 1994
NoMC	Maritime Code (Act no. 39 of 1994) (Norway)
HNSC	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996
RR	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)
SMC	Maritime Code 1994:1009 (Sweden)
SOLAS Convention	International Convention for the Safety of Life at Sea 1974
Swedish Bill	Swedish Government Bill on a New Maritime Code (Regeringens proposition om ny sjölag 1994/94:195)
US COGSA	Carriage of Goods by Sea Act (United States of America)
UK COGSA	Carriage of Goods by Sea Act 1971 (United Kingdom)

Authorities and organisations

CETDG	Committee of Experts on the Transport of Dangerous Goods
DCA	Danish Court of Appeal
DCC	Danish Court of First Instance
DSC	Danish Supreme Court
ECOSOC	United Nation Economic and Social Council
FSC	Finnish Supreme Court
IMO	International Maritime Organization
NCC	Norwegian Court of First Instance

NSC	Norwegian Supreme Court
Traficom	Finnish Transport and Communications Agency
UNCITRAL	United Nations Commission on International Trade Law
Working Group III	UNCITRAL Working Group on Transport Law

Other

Draft Instrument	CMI Draft Instrument on Transport Law
ND	Nordiske Domme i Sjøfartsanliggender (Nordic Judgments in Maritime Cases), Oslo, 1911-. ND is a collection of law reports on Nordic judgements within the field of maritime and transport law issued annually since 1911.
PSN	Proper Shipping Names
UNECE	United Nations Economic Commission for Europe
UN Recommendations	United Nations Recommendations on the Transport of Dangerous Goods

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Merchant Shipping Act (Act no. 170 of 1995) (Denmark) (DMC)
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Non-Nordic
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Carriage of Goods by Sea Act 1971 (United Kingdom) (UK COGSA)
Harter Act 1893 (United States of America)
Water Carriage of Goods Act of 1910 (Canada)

International
International Bulk Chemical Code (IBC Code)

International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code)

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International Gas Carrier Code (IGC Code)

International Maritime Dangerous Goods Code 38-16 (IMDG Code)

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